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Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs

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I. Introduction

Does the United States have powers inherent in sovereignty? At least since the 1819 decision in *McCulloch v. Maryland*, conventional wisdom has held that the national government is one of limited, enumerated powers and exercises "only the powers granted to it" by the Constitution and those implied powers "necessary and proper" to the exercise of the delegated powers.[1] All powers not delegated to the federal government are reserved to the states and to the people.[2] In the 1936 decision in *United States v. Curtiss-Wright Export Corp.*, however, the Supreme Court asserted that federal authority over foreign relations operated independently of the Constitution and was inherent in the United States' existence as a sovereign, independent nation.[3] Specifically, the Court, at the height of its pre-1937 scrutiny of federal authority, held that a joint resolution delegating to the President authority to criminalize foreign arms sales[4] did not violate the non-delegation doctrine.[5] This was true, Justice Sutherland wrote for the Court, because

1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.").

2. U.S. CONST. amend. X.

3. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

4. The joint resolution criminalized the sale of weapons to warring countries in South America, if the President found that the prohibition "may contribute to the reestablishment of peace" in the

> [t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true *only in respect of our internal affairs.*[6]

The foreign affairs powers existed prior to and independent of the Constitution, as essential sovereign powers:

> [T]he investment of the federal government with the powers of external sovereignty *did not depend upon the affirmative grants of the Constitution.* The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, *if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.*[7]

The powers of the United States in this field were equal to those of other states in the international community and derived from the law of nations: "As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."[8] Justice Sutherland thus portrayed the foreign affairs powers as independent of any constitutional delegation, deriving instead from international law concepts of sovereignty.

Having separated the *source* of the foreign affairs powers from the Constitution, Sutherland asserted that the *exercise* of these powers was unconstrained by other provisions of the Constitution: "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."[9] Instead, operations of the United States in the international sphere were governed by "treaties, international understandings and compacts, and the principles of international law."[10] In so reasoning, Sutherland relied upon a principle of territoriality, commonly held in the late nineteenth century, which viewed sovereignty as coterminous with territory. A member of the community of nations was considered to exercise complete sovereignty within its territorial jurisdiction and external sovereignty only (if at all) with respect to its own citizens. All other external relations were governed by the law of nations. Sutherland's strict

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region. Joint Resolution of May 28, 1934, 48 Stat. 811. The same day Congress adopted the resolution, President Roosevelt barred the sale of weapons to Bolivia and Paraguay, and the Curtiss-Wright Export Corporation was later indicted for conspiring to sell weapons to Bolivia in violation of the prohibition. *Curtiss-Wright*, 299 U.S. at 311–13.

5. *Id.* at 329.

6. *Id.* at 315–16 (emphasis added).

7. *Id.* at 318 (emphasis added).

8. *Id.*

9. *Id.* (citing Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909)).

10. *Id.*

territoriality vision of the Constitution thus dovetailed conveniently with his view that the nation's authority in external relations did not derive from the Constitution, but rather from the law of nations and sovereignty.[11]

Finally, Sutherland contended that the exercise of these external powers was largely isolated from judicial review. In light of the broad discretion enjoyed by the political branches over foreign affairs, "participation in the exercise of the power is significantly limited"[12] and "court[s] should not be in haste" to condemn its practice.[13]

In sum, Justice Sutherland abandoned the traditional concept of a limited national government derived from enumerated and reserved powers and replaced it with a bifurcated vision of *internal* and *external* powers, in which traditional enumerated-powers analysis applied only to U.S. *domestic* relations. According to this vision, the Constitution, both as a *source* of governmental authority and as a *constraint* on its exercise, stopped at the water's edge, and the powers of the United States in the external realm derived not from the Constitution, but from concepts of sovereignty shared, recognized, and defined by the community of nations. Ordinary constitutional constraints, such as the enumerated powers doctrine, separation of powers, and federalism were largely inapplicable, and courts, Sutherland surmised, should be reluctant to interfere with the exercise of the government's sovereign external powers.[14] These three elements—an extra-constitutional source of authority deriving from international law, relative lack of constitutional constraint, and limited judicial review—comprise the classic articulation of the inherent powers doctrine.

The theory that the national government may enjoy inherent, extraconstitutional sovereign powers may astonish students of American political theory. It is precisely the concept of a national government with limited powers, based on a written constitution, and subject to constitutional constraints and judicial review, that is supposed to distinguish the American democratic experiment from authoritarian forms of government. Even Justice Sutherland, six months earlier in *Carter v. Carter Coal Co.*, had rejected the possibility that Congress might possess an unenumerated, "inherent" power to enact federal labor legislation, writing, "It is no longer open to question that the general government . . . possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not

11. In an apparent concession to conventional analysis, Sutherland stated obliquely that the President's power over foreign relations, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320. This comment, however, was in tension with his other statements, *see supra* notes 6–7 and accompanying text, and he did not address what, if any, constitutional provisions he considered applicable.

12. *Curtiss-Wright*, 299 U.S. at 319.

13. *Id.* at 322.

14. *Id.*

with regard to legislation."[15] Commentators accordingly have criticized *Curtiss-Wright* as "shockingly inaccurate,"[16] for "mak[ing a] shambles out of the very idea of a constitutionally limited government,"[17] and for "introduc[ing] the notion that [the] national government possesses a secret reservoir of unaccountable power."[18] Harold Koh has argued that "*Curtiss-Wright* painted a dramatically different vision of the National Security Constitution from that which [had] prevailed since the founding of the Republic."[19] G. Edward White has portrayed the *Curtiss-Wright* decision as a sharp break from the "nineteenth century orthodoxy" of the enumerated powers doctrine and as presaging the Court's 1937 revolution of judicial deference to national authority.[20] Recently, several foreign affairs scholars have criticized the *Curtiss-Wright* doctrine as a twentieth-century anomaly and have urged that the foreign affairs power be brought back into the fold of mainstream constitutional jurisprudence.[21] Other critics have condemned Justice Sutherland's inherent powers arguments as dicta.[22] From various

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15. Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936) (invalidating federal labor legislation as exceeding Congress's powers under the Commerce Clause). In a little-noticed aside, however, Sutherland had left open the possibility that inherent powers might exist over foreign affairs, noting that "[t]he question in respect of the inherent power of that government as to the external affairs of the nation and in the field of international law is a wholly different matter which it is not necessary now to consider." *Id.*

16. CHARLES A. LOFGREN, *The Foreign Relations Power:* United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, *in* GOVERNMENT FROM REFLECTION AND CHOICE 167, 205 (1986). *See also* David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); C. Perry Patterson, *In re* The United States v. The Curtiss-Wright Corporation, 22 TEXAS L. REV. 286 (1944).

17. Levitan, *supra* note 16, at 497.

18. *Id.* at 493; *see also* James Quarles, *The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?*, 32 GEO. L.J. 375 (1944) (criticizing *Curtiss-Wright* for recognizing foreign powers extraneous to the Constitution).

19. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 94 (1990).

20. G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 33–93 (2000); *see also* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 5 (1999) (characterizing *Curtiss-Wright* as the culmination of a trend that had begun two decades prior); G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1118–20 (1999).

21. Professors Jack Goldsmith and Curtis Bradley have challenged *Curtiss-Wright*'s role in modern foreign relations jurisprudence in a number of articles calling for a greater role for federalism in foreign affairs. Curtis Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104–07 (1999) (predicting a shift away from foreign affairs exceptionalism); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 861–70 (1997); Jaek L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659–60 (1997) (rejecting *Curtiss-Wright* as authority for a federal common law of foreign relations).

22. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring). *But see* LOFGREN, *supra* note 16, at 204 (arguing that Sutherland's view of independent executive power is not dictum). For further critiques of Sutherland's analysis, see, *e.g.*, MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 18–34 (1990); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 20 (2d ed. 1996) ("The Sutherland Theory requires that a panoply of important powers be deduced from unwritten, uncertain, changing

perspectives, all of these scholars view the *Curtiss-Wright* decision as a radical break from established American legal theory. Nevertheless, *Curtiss-Wright* has endured. As the recent foreign relations disputes over Elían Gonzalez[23] and the Massachusetts Burma law[24] demonstrate, federal courts continue to invoke *Curtiss-Wright* in support of relatively unlimited federal authority over foreign affairs.

However sharply Justice Sutherland diverged from accepted American political doctrines of popular sovereignty and limited government, careful examination of the Court's decisions of the preceding century reveals that the theory of inherent *powers* did not spring fully formed from Sutherland's head. To the contrary, Sutherland's method of invoking inherent plenary power was entirely familiar to Supreme Court jurisprudence and derived directly from late-nineteenth-century judicial decisions addressing Indians, aliens, and territorial expansion. Sutherland's theory drew extensively from views of dual federalism, sovereignty, and the territorial scope of constitutional power that the Court articulated in a series of decisions in these areas between 1886 and 1910.

This Article examines the historical origins of the doctrine of inherent powers over foreign affairs and the Supreme Court's ultimate ratification of that doctrine in its late-nineteenth-century decisions concerning Indians, aliens, and territories. The doctrine of inherent powers, as used in this Article, is limited to powers sharing the three characteristics identified in *Curtiss-Wright*. First, the *source* of the authority derives not from the Constitution's enumerated clauses, but from the status of the United States as a sovereign nation. The authority is one possessed by all sovereign nations, as recognized by public international law. Consequently, the Article is not concerned with powers implied from, or incidental to, any specific clause of the Constitution. The focus is on powers derived from a source of authority external to the Constitution, not on powers implied from the Constitution's text.[25]

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concepts of international law and practice, developed and growing outside our constitutional tradition and our particular heritage."); Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 U. COLO. L. REV. 1127, 1133–35 (1999).

23. Gonzalez v. Reno, 212 F.3d 1338, 1353 (11th Cir. 2000) ("[I]n no context is the executive branch entitled to more deference than in the context of foreign affairs.") (citing *Curtiss-Wright*, 299 U.S. 304 (1936)).

24. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 50 (1st Cir. 1999) ("When it comes to foreign affairs, the powers of the federal government are not limited . . . .") (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315–16 (1936), *aff'd on other grounds sub nom.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)).

25. One could argue, of course, that a "power inherent in sovereignty," such as the immigration power, was not entirely extraconstitutional, but instead was incidental to the national sovereignty that the Constitution established. In other words, the Constitution created a sovereign national government, which must be presumed to have certain additional, albeit unenumerated, powers. The Court rejected this approach in *Curtiss-Wright*, which expressly states that the foreign affairs powers exist independent of the Constitution. The theory that sovereign power is rooted in the

Second, the Constitution imposes few or no *constraints*, such as the separation of powers or individual rights, on the exercise of the sovereign power. This criterion is not necessary to all powers with an extraconstitutional source. It would be possible to conclude that a power derived from international law, but nevertheless was limited by other provisions of the Constitution. Such a power would pose fewer concerns for the doctrine of enumerated powers and limited government. This Article, however, focuses on powers that are neither derived from, nor substantially limited by, the Constitution.

Finally, the inherent powers considered herein are relatively *insulated from judicial review*. They are, in short, both inherent in their origin and plenary in their exercise.[26]

Although James Wilson advanced a theory of inherent power in the pre-constitutional era,[27] there was little support in either the constitutional

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Constitution could, however, be imputed to some of the late-nineteenth-century inherent powers immigration decisions, which contain scattered language to that effect and also contain ambiguous language about the source of the sovereign power. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) ("The Constitution of the United States speaks with no uncertain sound upon this subject."); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . . ."). Viewing the Constitution as a whole as the source of such powers, however, does not significantly remedy the difficulty that the concept of such unenumerated, inherent powers poses for the enumerated powers doctrine.

26. As David Engdahl has noted, the term "plenary power" has been used to describe a number of distinct constitutional concepts. David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 363–66 (1976) (observing that plenary power may refer to a power exclusively held by one branch of government, a power that preempts state action, or a power that is unlimited). The term has been used in constitutional discourse to include such familiar powers as the congressional spending and commerce powers, the President's pardon power, and the impeachment powers of the House and Senate. These textually based powers share with the powers discussed in this Article the characteristics of relative insulation from other constitutional constraints and judicial review. They differ, however, in their express derivation from the constitutional text and their assignment to a particular branch of government. It is to the concept of national inherent powers rooted in international law and sovereignty that this Article is dedicated.

27. In 1785, James Wilson, a prominent Federalist who later became one of the first justices of the United States Supreme Court, argued, in support of Congress's effort to establish a national bank, that in addition to its enumerated powers, the national government possessed certain "general rights, general powers, and general obligations" that were "incident" and essential to independent states under the law of nations:

> To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature.

James Wilson, *Considerations on the Bank of North America* (1785), *reprinted in* 2 THE WORKS OF JAMES WILSON 829 (Robert Green McCloskey ed., 1967). *See also* Letter from George Mason to Thomas Jefferson (Sept. 27, 1781), *in* 2 THE PAPERS OF GEORGE MASON, 1725–1792, at 697–99 (Robert A. Rutland ed., 1970) (critiquing arguments that the national government ought to possess inherent sovereign powers). Wilson later abandoned this position and ultimately opposed a bill of

debates or the Federalist Papers for the concept of inherent, unenumerated sovereign federal powers.[28] Moreover, few arguments based on powers inherent in sovereignty emerged in the early nineteenth century, though certain inroads on traditional enumerated powers and limited government analysis were made.[29] From an early date, national power over Indians was justified in part on theories of territorial discovery and of the Indians' aboriginal status under international law,[30] but this authority also was generally viewed as limited to the scope of the federal war, treaty, and Indian commerce powers.[31] Supporters of the 1798 Alien Act (which established a broad executive power to expel aliens) consistently looked to the Constitution for an enumerated source of the power, though some contended that the power was otherwise unlimited because aliens were not entitled to constitutional protections.[32] Likewise, supporters of the 1803 Louisiana Purchase generally looked to the Constitution for an enumerated source of authority to acquire and govern territory, though some members of Congress also suggested that the enumerated authority to govern territory, once found, was not otherwise constrained by the Constitution.[33] Moreover, these early disputes were largely resolved in favor of traditional constitutional analysis. The Alien Act was widely dismissed as unconstitutional, and the inhabitants of Louisiana were ultimately placed on the road to statehood and citizenship. The concept of inherent powers continued to appear sporadically in congressional debates and legal arguments relating to Indians, aliens, and

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rights as unnecessary surplusage on the grounds that the national government derived its power solely "from the positive grant expressed in the instrument of the union." PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 143–44, 313–14 (John Bach McMaster & Frederick D. Stone eds., 1888); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 540 (1969) (discussing the Federalists' arguments that a bill of rights was unnecessary). "[E]very thing which is not given, is reserved," Wilson observed. 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 339 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (Philadelphia address of James Wilson); *see also* 2 *id.* at 454–56 (statement to the Pennsylvania Convention that the national government possesses only enumerated powers). Wilson, in particular, abandoned his prior theory of inherent powers in favor of a theory of popular sovereignty. By 1787, Wilson had developed a concept of sovereignty as ultimately held not by the national government (as in the British Parliament) nor by the state governments (as under the Articles of Confederation), but by the people. WOOD, *supra*, at 530–31.

28. Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000). Professor Ramsey concludes, after an examination of the ratification debates and other contemporaneous sources, that the constitutional generation believed "that foreign affairs powers, like other powers, were allocated between the state and federal governments by the terms of the nation's governing document." *Id.* at 386.

29. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 204–05 (1997) (suggesting that the Third Congress adopted the national flag under a theory of inherent powers). It would be equally possible to conclude, however, that the creation of a flag was an implied power, necessary and proper to maintaining an army and navy.

30. For a discussion of the discovery doctrine and *Johnson v. M'Intosh*, 21 U.S. 543 (1823), see *infra* notes 148–81 and accompanying text.

31. *See infra* notes 241–43 and accompanying text.

32. *See infra* notes 615–65 and accompanying text.

33. *See infra* notes 1152–228 and accompanying text.

territories throughout the nineteenth century, but the theory was a distinct minority position and was generally rejected by the courts.[34]

In the late nineteenth century, however, the inherent powers doctrine was embraced by the national political branches and ratified by a majority of the Court. In the period from 1886 to 1910, the Court repeatedly asserted the doctrine of inherent powers to uphold federal authority over Indians, and over immigrants in entry and exclusion proceedings, and to justify the exercise of U.S. power abroad. The decisions in *United States v. Kagama* (1886),[35] *Chae Chan Ping v. United States* (The Chinese Exclusion Case) (1889),[36] *Church of Jesus Christ of Latter-Day Saints v. United States* (1890),[37] *Jones v. United States* (1890),[38] *In re Ross* (1891),[39] *Nishimura Ekiu v. United States* (1892),[40] *Fong Yue Ting v. United States* (1893),[41] *Stephens v. Cherokee Nation* (1899),[42] *Cherokee Nation v. Hitchcock* (1902),[43] *Lone Wolf v. Hitchcock* (1903),[44] the *Insular Cases* (1901–1904),[45]

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34. *But see* United States v. Rogers, 45 U.S. (4 How.) 567 (1846), discussed *infra* notes 263–81 and accompanying text.

35. 118 U.S. 375, 380 (1886) (upholding Congress's authority to adopt the Indian Major Crimes Act as a result of the "exclusive sovereignty" in the national government).

36. 130 U.S. 581, 609 (1889) (upholding the "power of exclusion of foreigners [as] an incident of sovereignty").

37. The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) (noting that Congress's powers over the territories "are those of national sovereignty, and belong to all independent governments").

38. 137 U.S. 202, 212 (1890) (finding that Congress's power to legislate for territories derives from "the law of nations, recognized by all civilized States").

39. 140 U.S. 453, 464 (1891) (finding that the Constitution does not protect citizens extraterritorially).

40. 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovercign nation has the power, as inherent in sovereignty, . . . to forbid the entrance of foreigners . . . .").

41. 149 U.S. 698, 711 (1893) ("The right to . . . expel all aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation . . . ."); *see also* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete [than immigration].").

42. 174 U.S. 445, 478 (1899) (recognizing Congress's "plenary power of legislation" over Indian tribes).

43. 187 U.S. 294, 307–08 (1902) (noting that Congress has plenary power to lease tribal lands without their consent).

44. 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

45. The name refers to a series of decisions regarding the application of United States laws to the territories of, *inter alia*, Puerto Rico and the Philippines, acquired in the Spanish-American War. The cases involved the application of tariff laws, *e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings*, 183 U.S. 176 (1901); and constitutional criminal provisions, *e.g.*, *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (grand jury indictment and jury trial); *Kepner v. United States*, 195 U.S. 100 (1904) (double jeopardy); *Dorr v. United States*, 195 U.S. 138 (1904) (right to jury trial).

and *United States v. Celestine* (1909),[46] all relied upon powers derived from the status of the United States as a nation to hold that most basic constitutional protections did not apply to these groups. The theory of inherent plenary powers drew upon doctrines of customary international law regarding the sovereign powers of the nation-state. International law principles regarding territoriality were applied to the Constitution to limit its reach abroad, while substantive rules regarding national authority to acquire Indian lands and interact with aboriginal tribes, to admit and exclude aliens, and to govern the inhabitants of newly acquired lands also were substantially derived from international law. The inherent powers decisions thus stand as important examples of the Supreme Court's application of customary international law principles and their incorporation into constitutional doctrine.

These controversies shared a number of characteristics that led the Court to treat them as constitutionally exceptional. First, the Constitution is relatively silent regarding the authority of the United States over all three areas. The exercise of national power thus posed challenges for traditional enumerated powers analysis. Second, all three doctrinal areas implicated persons who were non-citizens and who were racially, culturally, and religiously distinct from the nation's Anglo-Saxon, Christian elites. The Court accordingly was less concerned with protecting individual rights in these areas. Third, all three areas involved U.S. relations with lands outside of the jurisdiction of the states—whether Indian lands, the foreign countries of origin of immigrants, or U.S. territories. Concerns of federalism, which might have led the Court to limit national power in areas touching on relations with the several states, were thus not implicated. The approach to foreign relations powers articulated in these cases provided the foundation for the inherent powers thesis asserted in *Curtiss-Wright*. Indeed, Justice Sutherland formulated his theory of inherent foreign affairs powers in 1909, during the height of the inherent powers era,[47] although he would not have the opportunity to elevate it to Supreme Court doctrine until a quarter of a century later.

The result was an inversion of the enumerated powers doctrine. At the time of the framing, the sovereignty of the United States was viewed as being

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46. 215 U.S. 278, 289–90 (1909) (finding that the citizenship status of Indians did not limit Congress's plenary authority); *accord* United States v. Nice, 241 U.S. 591, 598 (1916); United States v. Sandoval, 231 U.S. 28, 48 (1913).

47. Sutherland first advanced the theory in 1909 as a Senator from Utah, *see* S. DOC. NO. 61-417 (1909), and reprinted the essay the following year. George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373 (1910) [hereinafter Sutherland, *Internal and External Powers*]. *See* WHITE, *supra* note 20, at 47. Sutherland further developed the theory in a series of lectures published by Columbia University in 1919. GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 24–69 (Columbia U. Press 1919). His biographer notes that he may have derived the theory from Judge James V. Campbell, one of his professors at the University of Michigan Law School. JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 226–28 (1951).

divided and shared among the national government, the state governments, and the people.[48] All powers were shared between the states and the people, who ceded certain of their powers to the federal government. Together, this collective sovereignty presumably possessed all the powers known to independent sovereign states. But the sovereignty of the national government itself was imperfect—qualified both by the limited delegations of authority and by express restrictions on the authority's exercise. By the end of the nineteenth century, this image of the American government had substantially transformed in areas touching on foreign relations. Nation-building, expansionist impulses, international law doctrines of territoriality and sovereignty, and ascriptivist, membership visions of American identity combined to craft a new vision of the national government as a complete sovereign, possessing all the powers enjoyed by authoritarian European states in its external relations. Where relations with Indians, aliens, and foreign territories were concerned, the United States, and Congress in particular, enjoyed practically all conceivable powers of a fully sovereign nation rather than being a government of limited powers derived from the enumerated clauses of the Constitution.

The Indian, alien, and territory cases often have been ignored by mainstream constitutional law scholars as late-nineteenth-century anomalies of American constitutional jurisprudence. The doctrines developed during this period, however, continue to be the controlling constitutional authority in all three areas. Furthermore, as the ongoing importance of *Curtiss-Wright* suggests, the decisions continue to exert a powerful influence over the Court's approach to general foreign affairs jurisprudence. It is precisely the convergence of these doctrines that provides the legal basis for the George W. Bush Administration's current detention of alleged enemy aliens at the Guantanamo Naval Base in Cuba. The doctrines supporting the United States' plenary power over aliens and territories beyond its borders combine with *Curtiss-Wright* to render Guantanamo a "Constitution-free zone" in the eyes of the Administration.[49] These doctrines thus stand as important

48. *See, e.g.*, WOOD, *supra* note 27, at 529, 558.

49. Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002) (appeal pending) (dismissing claims of Guantanamo detainees on the grounds that aliens on Guantanamo have no right to habeas corpus or protection under the Fifth Amendment). The U.S. Naval Base on Guantanamo is subject to the complete jurisdiction and control of the United States. It has been used by previous administrations to detain Haitian and Cuban refugees with the expectation that ordinary constitutional rights would not attach to aliens detained outside U.S. territory. *Compare* Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992) (upholding a preliminary injunction based on the Fifth Amendment claims of Haitians detained at Guantanamo), *vacated as moot*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 918 (1993), *and* Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993) (applying the Fifth Amendment to Haitians indefinitely detained at Guantanamo), *vacated by Stipulated Order Approving Class Action Settlement Agreement* (Feb. 22, 1994), *with* Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995) (rejecting a constitutional challenge under the Fifth Amendment by Cubans detained at Guantanamo), *and* Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498, 1503 (11th Cir. 1992) (rejecting First and Fifth Amendment claims of

exceptions to mainstream principles of American political theory and national identity, and as a cornerstone of U.S. foreign affairs authority.

Until recently, scholars had generally overlooked the interrelationship between the doctrines of sovereignty relating to Indians, aliens, and territories, and had failed to systematically connect these separate doctrinal areas to modern foreign relations jurisprudence.[50] Although immigration[51] and Indian law[52] scholars have examined the plenary powers doctrine, their analyses tend to be restricted to their individual doctrinal fields. While some constitutional and foreign relations scholars have recognized the contribution of immigration law to foreign relations jurisprudence, most have failed to acknowledge the important contributions of the Indian and territorial law doctrines.[53] Similarly, Professor Gerald Neuman's recent work on the scope of the Constitution in the immigration and territorial expansion contexts does not focus on inherent powers theories or consider the contribution of Indian

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Haitians interdicted on the high seas). *Cf.* Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573 (Fed. Cir. 1993) (upholding a Fifth Amendment takings claim on Guantanamo).

50. This Article provides a thorough explieation of the analysis first set forth by the author in 1999. *See* Cleveland, *supra* note 22. Since that date, at least two other authors have addressed aspects of the inherent powers cases. Alexander Aleinikoff's important new book examines the modern implications of the inherent powers cases for citizenship and constitutional rights. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002). *See also* Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002) (arguing that international law offers a remedy for the inherent powers cases).

51. Stephen Legomsky did the pathbreaking work tracing the evolution of the plenary power doctrine in immigration. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 177–222 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255. Other critics of the persistence of the plenary power doctrine in the immigration area include: ALEINIKOFF, *supra* note 50; T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

52. Nell Jessup Newton did the seminal work tracing the Indian plenary power doctrine. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984). *See also* Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, *in* EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION (Oren R. Lyons & John C. Mohawks eds., 1992); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT (1997) [hereinafter WILKINS, AMERICAN INDIAN SOVEREIGNTY] (analyzing federal Indian law cases under Critical Legal Theory); David E. Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power": An Analysis of Case Law Affecting Tribal Sovereignty (1886–1914)*, 18 AM. IND. Q. 349 (1994); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996) [hereinafter Frickey, *Domesticating*] (discussing plenary power within the context of federal Indian law compared to its usage in immigration law); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

53. *See, e.g.*, HENKIN, *supra* note 22, at 16 (discussing *Chae Chan Ping* as a predecessor to *Curtiss-Wright*).

law.[54] All three doctrinal areas, however, share important theoretical links, as Professor Aleinikoff has noted,[55] and their combined contribution is critical to a comprehensive understanding of modern constitutional views of sovereignty and federal power. The cases are both important predecessors to the inherent powers doctrine in *Curtiss-Wright* and have a broader import as examples of the Supreme Court's willingness not only to enforce customary international law but to elevate international law principles to constitutional status.

The decisions also raise profound questions regarding the ongoing validity of the inherent powers doctrine in the Indian, alien, and territory contexts, as well as in *Curtiss-Wright*. The nineteenth century history of the inherent powers doctrine reveals that the doctrine cannot be justified by mainstream forms of constitutional analysis. The inherent powers doctrine cannot be vindicated as originalism. It was not accepted at the nation's inception, is not supported by the Constitution's text and structure, and is contrary to the principles of political theory which inform the American constitutional system. It cannot be defended on doctrinal grounds, since most of the late-nineteenth-century doctrines from which the theory derives have long since been abandoned in other jurisprudential contexts. Nor can it be defended as modernism. The doctrine's origins instead lie in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power.

This Article examines the evolution of the doctrine of inherent powers in cases involving Indians, aliens, and territories in an attempt to discern the origins of the doctrine and its relationship to traditional constitutional jurisprudence. Part II identifies the doctrinal principles of sovereignty, territoriality, and membership that undergirded the late-nineteenth-century Court's inherent powers analysis. Parts III through V consider the evolution of the inherent powers doctrine in nineteenth century Supreme Court jurisprudence regarding Indians, aliens, and territories, respectively. Part VI explores the dichotomy between the inherent powers decisions and the Court's stringent enforcement of enumerated powers doctrines in the domestic sphere during the same period. This section argues that the anomalous decisions in the inherent powers cases were the product of a

54. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); *see also* Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSIONISM, AND THE CONSTITUTION 182 (Christina Duffy Burnett & Burke Marshall eds., 2001). Other commentators on the implications of territorial doctrine for constitutional law include T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15 (1994); Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 121 (Christina Duffy Burnett & Burke Marshall eds., 2001).

55. ALEINIKOFF, *supra* note 50, at 11–36.

unique convergence of late-nineteenth-century ideological forces: doctrinal obsession with federalism and dual sovereignty (concerns that were not implicated in the foreign affairs realm) with peculiarly nativist, nationalistic, and authoritarian impulses among the nation's political elites that justified the subjugation of "inferior" peoples. Part VII briefly reexamines the *Curtiss-Wright* decision and traces its origins in the nineteenth century inherent powers cases. Finally, the Article concludes by offering some thoughts about the implications of the inherent powers decisions for contemporary constitutional jurisprudence and international law.

II. Sovereignty and the Constitution

The Supreme Court drew upon a number of legal doctrines to support its inherent powers decisions. As discussed below, the Court invoked principles of membership and territoriality to limit the Constitution's applicability to alien populations or overseas territories. The Court also used substantive rules regarding sovereignty and the authority of states over aliens, territories, and aboriginal peoples to justify granting to the United States powers equivalent to those held by other nations under international law.

A. Sovereignty

At the core of the Supreme Court's inherent powers decisions lies a struggle to identify the relationship between international law conceptions of sovereignty and the domestic authority created by the Constitution. Sovereignty, in its most basic sense, refers to a recognized set of international rules regarding the definition and authority of a nation-state and its interactions with other states. According to naturalist international law scholars such as Emer de Vattel,[56] whose work was influential upon many nineteenth century American jurists, all nations possessed certain powers inherent in their existence as nations. These powers were defined, shared, and recognized by all members of the family of nations and were essential to a nation's identity as an independent state. Sovereign powers were not subject to any external or positive constraints, save the rights of other sovereigns under international law, and any effort to limit these powers would undermine the nation's independence and equal status in the international community.[57] The U.S. Supreme Court early recognized, however, that the specific sovereign powers actually held by any particular state were determined by that state's domestic law, which might modify, or deny

56. EMER DE VATTEL, THE LAW OF NATIONS (Joseph Chitty ed., T. & J.W. Johnson & Co. 1876) (1758). Nineteenth century publicists who examined the international law nature of sovereignty include HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (James Brown Scott ed., 1866), and HENRY W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (1861).

57. VATTEL, *supra* note 56, bk. II, ch. IV, § 54, at 154.

altogether, the powers otherwise bestowed by international law.[58] Thus, answering the question of what international law allowed did not resolve what the Constitution allowed or required. The Constitution could deny the international power to the national government by reserving it to the states, or even withhold the power from both levels of government by reserving it to the people.

Chief Justice Marshall explored the relationship between international concepts of sovereignty and the United States' system of limited government early on in *McCulloch v. Maryland*.[59] In support of its tax on the national bank, Maryland argued that the creation of a corporation was an inherent sovereign power. Maryland reasoned that, because the states possessed all powers that had not been expressly delegated to the national government, such an inherent power was reserved to the states.[60] In his opinion for the Court, Marshall acknowledged that the powers to create a corporation and to tax were both powers "appertaining to sovereignty."[61] This fact, however, did not determine where the power was located in the United States' system of government. "[A]ll legislative powers appertain to sovereignty,"[62] Marshall observed, but in the American political system, sovereignty was shared.[63] The national government held the power to incorporate a bank, not because the power was an incident of sovereignty, but because the power was reasonably implied from that government's enumerated powers.[64] In other words, the fact that a power was "sovereign" under public international law did not determine whether it was held by the national government. The people, as the ultimate possessors of sovereignty, delegated certain powers to the national government.[65] The national government, in turn, could exercise only these enumerated powers and the implied powers necessary and proper to them.[66]

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58. *E.g.*, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) ("All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.").

59. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

60. *Id.* at 427.

61. *Id.* at 411.

62. *Id.* at 409.

63. *Id.* at 410 ("In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other.").

64. *Id.* at 410–12.

65. *Id.* at 403–05 ("The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to . . . secure the blessings of liberty to themselves and to their posterity.'. . . The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").

66. *Id.* at 413.

Chief Justice Marshall specifically contrasted the "modest" authority to create a bank, which reasonably could be implied from other enumerated powers, with the "great substantive and independent power[s]," such as "the power of making war, or levying taxes, or of regulating commerce."[67] Although these powers also appertained to sovereignty, Marshall observed, they "cannot be implied as incidental to other powers, or used as a means of executing them."[68] Unless enumerated, they could not be exercised by the national government.

McCulloch thus reconciled sovereign international powers within the framework of classical American concepts of limited government. The "sovereign" powers of the United States, like all other powers, must be determined according to the enumerated and reserved powers set forth in the Constitution.

B. The Constitution's Scope

Does the Constitution, or do its specific provisions, apply to non-citizens within the United States or to U.S. actions abroad? Questions about the geographic and popular scope of the Constitution were central to the nineteenth century inherent powers cases, and were not readily resolved by the Constitution's text. As Gerald Neuman has eloquently observed, the Constitution contains ambiguities regarding both its *geographic* scope and the *population* to which it applies.[69]

Some issues of the Constitution's geographic and popular scope appear to be addressed explicitly in the text. For example, with respect to geographic scope, certain constitutional provisions refer only to the several states. The Constitution expressly gives only states voting representation in Congress[70] and the Electoral College;[71] only states are guaranteed a republican form of government;[72] the Article IV Privileges and Immunities Clause is limited to "[t]he Citizens of each State";[73] and the Full Faith and Credit Clause applies to the "public Acts" of each "State."[74] These provisions, on their face, appear to deny their protections to individuals who reside in the District of Columbia, Puerto Rico, the Virgin Islands, and other

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67. *Id.* at 411.

68. *Id.*

69. *See* NEUMAN, *supra* note 54, at 4–15. Neuman traces four approaches to the Constitution's scope that have evolved in American history: universalism, membership, mutuality of legal obligation, and global due process. *Id.* at 4–8.

70. U.S. CONST. art. 1, § 2, cl. 1; *id.* art. 1, § 3, cl. 1.

71. *Id.* art. II, § 1, cl. 2. The Twenty-Third Amendment granted representation in the Electoral College to the District of Columbia. *Id.* amend. XXIII.

72. *Id.* art. IV, § 4 (guaranteeing "every State in this Union a Republican Form of Government[] and protect[ion] . . . against Invasion").

73. *Id.* art. IV, § 2.

74. *Id.* art. IV, § 1.

territories outside of the organized states of the Union. Other provisions, such as the Uniformity Clause,[75] refer to the "United States" as the relevant geographic region, leaving open the question, which was hotly contested in the *Insular Cases*, whether the "United States" textually refers only to the organized states and territories or also includes unorganized territories and overseas possessions.[76] Finally, some constitutional provisions expressly reach beyond the states, such as the Article III Jury Trial Clause[77] and the Thirteenth Amendment,[78] while others, such as the Article I power "[t]o define and punish Piracies and Felonies committed on the high Seas," expressly contemplate extraterritorial jurisdiction.[79]

Only a few provisions of the Constitution limit their application to certain *persons*. The Article IV Privileges and Immunities Clause is limited to the citizens of states, as noted above, but few other constitutional provisions are conditioned on citizenship.[80] The Constitution generally suggests a more universal approach. Most provisions of the Bill of Rights refer generically to "the people" or to persons, such as the Fifth Amendment's mandate that no "person" may be deprived of life, liberty, or property without due process,[81] and the Tenth Amendment's reservation of nondelegated powers to "the people."[82] The Fourteenth Amendment for the first time defined national citizenship and barred the states from abridging "the privileges or immunities of citizens of the United States."[83] Thus, as Alexander Bickel noted, "the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen."[84]

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75. *Id.* § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.").

76. *See infra* Part V(G).

77. *Id.* art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury; . . . when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

78. *Id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

79. *Id.* art. I, § 8, cl. 10.

80. Citizenship is required to hold the federal offices of senator, *id.* art. I, § 3, cl. 3, and member of Congress, *id.* art. I, § 2, cl. 2, and natural-born citizenship is required for the presidency, *id.* art. 2, § 1, cl. 5.

81. *Id.* amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall any person . . . be twice put in jeopardy . . . nor be deprived of life, liberty, or property, without due process of law . . . .") (emphasis added); *see also id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

82. *Id.* amend. X; *see also id.* amend. I ("the right of the people peaceably to assemble"); *id.* amend. II ("the right of the people to keep and bear Arms"); *id.* amend. IV ("The right of the people to be secure in their . . . houses").

83. *Id.* amend. XIV, § 1.

84. ALEXANDER M. BICKEL, *Citizen or Person? What is not Granted Cannot Be Taken Away*, *in* THE MORALITY OF CONSENT 33, 36 (1975).

On the other hand, most of the Constitution's provisions are not textually restricted by either the population or the geographic area to which they apply. Instead, they define the general powers of the national government or impose general limits on the exercise of these powers. Article I unqualifiedly prohibits the suspension of habeas corpus[85] and the adoption of ex post facto laws or bills of attainder.[86] The First Amendment simply provides that "Congress shall make no law,"[87] the Third Amendment generally prohibits the quartering of soldiers,[88] and the Fifth Amendment prohibits the taking of property.[89] Structural provisions of bicameralism and presentment are general in their application, as are the congressional taxation power,[90] the executive's Commander in Chief power,[91] and so forth. These general provisions, on their face, appear to apply to the national government, regardless of where, and against whom, it acts.

In short, a purely textual reading of the Constitution suggests that, while certain provisions apply only in the several states or to citizens, the majority of the Constitution's provisions are not qualified with respect to either geography or population. To deny the application of these general provisions to Indians, aliens, African Americans, citizens abroad, or the peoples of newly acquired territories requires an additional, non-textual, theory of the Constitution's scope. In the nineteenth century, theories of membership and territoriality were superimposed upon the constitutional text to restrict both its popular and territorial application. As discussed below, the nineteenth century decisions reflect three approaches to the question of to whom the Constitution applies: enumerated powers-limited government, social contract-membership, and territoriality approaches.

1. Enumerated Powers-Limited Government.—Under classical enumerated powers and limited government theory, the scope of the Constitution's general provisions is considered from the perspeetive of the government's authority to act in any given context. Where the government is based on a written constitution of enumerated and rescrved powers, the Constitution operates, not as a bestower of certain rights on a designated population, but as both the source of governmental authority and a constraint on governmental power. Enumerated powers doctrine provides that the government may exercise only those powers delegated to it (including all

85. U.S. CONST. art. I, § 9, cl. 2.

86. *Id.* art. 1, § 9, cl. 3.

87. *Id.* amend. I.

88. *Id.* amend. III ("No Soldier shall, in time of peace be quartered in any house . . . .").

89. *Id.* amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also id.* amend. VII ("In Suits at common law, . . . the right of trial by jury shall be preserved . . . ."); *id.* amend. VIII ("nor cruel and unusual punishments inflicted").

90. *Id.* art. I, § 8, cl. 1.

91. *Id.* art. II, § 2, cl. I.

properly implied and incidental powers). Because the Constitution is viewed as the creator and origin of all national government authority, the government does not exist, and cannot operate, outside of the Constitution's reach.[92] Limited government theory further provides that the government's enumerated powers are constrained by the Constitution's prohibitions on government action, such as the prohibition against the suspension of habeas corpus,[93] and by the Bill of Rights. In this Article, "enumerated powers" is used to refer to the Constitution's delegated powers as a source of authority to act, while "limited government" is used to refer to the positivc constraints, such as individual rights, that the Constitution imposes on governmental power.

In addition to the general clauses of the Constitution, enumerated powers-limited government approaches find support in the universalist, egalitarian language of the Declaration of Independence and the Reconstruction Amendments.[94] Throughout the nineteenth century, these provisions were invoked to oppose more contingent social contraet and membership approaches.[95]

2. Social Contract-Membership.—Social contract or membership approaches begin with the individual or entity being acted upon by the government and consider whether that individual is one intended to be protected by the Constitution. Social contract theory emphasizes the consent of a partieular population to be governed. A government is legitimate, not because it is inherently limited, but because the members of the citizenry have agreed to be governed in a particular manner. Membership approaches in essence replace the concept of natural rights with a theory of positive rights arising from the contract between the government and the governed. This theory has significant implications for individuals subject to government action who are not parties to that agreement. Only members and beneficiaries of the social contract are able to make claims against the government and are entitled to the contract's protections, and the government may act outside of the contract's constraints against individuals who are nonmembers.

92. Contrast the enumerated powers theory of the Constitution with the constitutions of the several states, which are not the source of state authority, but nevertheless constrain their power.

93. U.S. CONST. art. I, § 9, cl. 2.

94. *Id.* amend. XIII–XV.

95. *See, e.g.*, ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 36–37 (1997) (discussing the use of the natural rights view of the Declaration of Independence to presumptively invalidate illiberal laws).

Social contract approaches find support in the Constitution's Preamble, which some read to suggest a membership vision.[96] The Preamble provides that "We the People of the United States," acting to secure the "Blessings of Liberty" for "ourselves and our Posterity," establish the Constitution "for the United States of America."[97] This language could be interpreted to mean that the Constitution as a whole applies only to "the People of the United States" and possibly only when they are physically within "the United States of America." Under this approach, only the members of the constitutional compact would be entitled to its protections. On the other hand, this restrictive interpretation is not compelled by the Preamble. Even the Preamble speaks of "the People" rather than "the citizens" or, as Alexander Bickel has noted, "we the citizens of the United States at the time of the formation of this union."[98]

A consent or membership approach alone does not resolve the question of *who* will be considered a member. "We the people" potentially could be narrowly defined to include only citizens, only a subset of citizens (such as whites, males, or property owners), or only residents of the existing states. Or it could be more broadly defined to include aliens lawfully admitted to the United States or those simply present in the U.S. territory for some period. In the late nineteenth century, social contract approaches resolved the question of membership in favor of a white, male, Protestant vision of the national identity. Entitlement to constitutional protection was determined on the basis of the ascribed characteristics of race, gender, nationality, and religion.[99] Under this ascriptivist approach, Anglo-Saxon, Christian heritage was the touchstone for full membership in the American polity.

Enumerated powers-limited government and social contract-membership approaches may yield different outcomes regarding the Constitution's application to persons viewed as non-members. An enumerated powers approach, for example, would maintain that federal authority over Indians derived from, and was limited to, the government's delegated powers.[100] Likewise, under a pure limited government approach, the general provisions of the Constitution would apply to constrain the government regardless of where, and against whom, it acted. Both aliens[101]

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96. *See, e.g.*, NEUMAN, *supra* note 54, at 5 (noting that "[t]he Preamble arguably speaks the language of social contract"). *See also infra* note 346 and accompanying text (argument of George Canfield that "we the people" does not include Indian tribes).

97. U.S. CONST. pmbl.

98. BICKEL, *supra* note 84, at 36.

99. SMITH, *supra* note 95, at 3.

100. Cherokee Nation v. S. Kan. Ry., 135 U.S. 641, 657–58 (1890) (finding that the Commerce Clause gives Congress authority to condemn Indian lands).

101. *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369–70 (1886) (holding that the Fourteenth Amendment Equal Protection Clause applies to aliens in the United States); Wong Wing v. United

and inhabitants of U.S. territories would constitute "persons" entitled to the protections of the Due Process and Equal Protection Clauses, and the Fourteenth Amendment's bestowal of citizenship on "all persons born in the United States" would include the children of immigrants.[102]

A membership view, by contrast, could conclude that aliens, residents of foreign territories, or Indians were not entitled to due process or other protections because these groups were not intended to be beneficiaries of the Constitution. The government accordingly could exercise absolute, plenary power over them based on its inherent powers. Alternatively, a membership approach could conclude that a lawfully admitted alien *was* entitled to due process protections because her admission constituted consent to join the U.S. polity.

Various members of the Court utilized enumerated powers-limited government or social contract-membership approaches throughout the nineteenth century, with radically different results. Jurists such as Chief Justice Taney[103] and Justice Edward Douglass White were identified with membership approaches, while Justices John Marshall Harlan, Brewer, Field, and Chief Justice Fuller frequently, though not invariably, invoked enumerated powers-limited government views.[104] These approaches to the scope of governmental authority also overlapped during the nineteenth century with a third consideration: the territorial scope of the Constitution.

3. Territoriality.—In addition to the Constitution's textual restrictions on geographic scope discussed previously, a general theory of territoriality was applied to limit the Constitution's application to the contiguous United

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States, 163 U.S. 228, 235–38 (1896) (concluding that the Fifth and Sixth Amendments apply to aliens unlawfully within the United States).

102. United States v. Wong Kim Ark, 169 U.S. 649, 696–704 (1898) (finding that Chinese persons born in the United States are citizens under the Fourteenth Amendment).

103. Chief Justice Taney authored the most infamous articulation of constitutional social contract theory in *Dred Scott*, in which he combined social contract and enumerated powers theories to conclude that blacks were not members of the constitutional polity and that Congress, as an entity of limited, delegated powers, lacked authority to make blacks citizens of the United States. Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857). According to the Chief Justice:

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not . . . .

Id.

104. Notable exceptions from this approach were Justice Field's opinion for the Court in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and Chief Justice Fuller's dissent with Justice Harlan in *United States v. Wong Kim Ark*, 169 U.S. at 705 (Fuller, C.J., with whom Harlan, J., concurs, dissenting).

States. Territoriality was integral to nineteenth century concepts of sovereignty because, under international law principles, a sovereign's jurisdiction to legally regulate conduct was coterminous with its territory.[105] A state enjoyed absolute jurisdiction to act within its territory, but was incompetent to act outside of it, except possibly to exercise authority over its own nationals.[106] Principles of comity directed states to respect the sovereign jurisdiction of others and to avoid jurisdictional conflicts. Chief Justice Marshall articulated this vision of the "perfect equality and absolute independence of sovereigns"[107] in *The Exchange*:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute .... Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction.
>
> ....
>
> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.[108]

In practice, territoriality was not an absolute rule. Nineteenth century writers recognized that the principle of strict territoriality had been relaxed somewhat, and Chief Justice Marshall acknowledged that national laws were being extended extraterritorially.[109]

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105. In 1866, Wheaton described the sovereign and mutual independence of nations as establishing the principle that "[e]very nation possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory [and] that the laws of every State control, of right, all the real and personal property within its territory, as well as the inhabitants of the territory, whether born there or not...." WHEATON, *supra* note 56, § 78. The principle of absolute authority within a sovereign territory was accompanied by an absolute lack of authority beyond it. "[N]o State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not." *Id.*; *see also id.* §§ 84, 111, 118.

106. International law was unsettled regarding a state's authority to regulate the extraterritorial conduct of its nationals. Wheaton believed that states could not exercise such jurisdiction. *Id.* § 78. In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355–56 (1909), Justice Holmes held that U.S. statutes lacked effect in the territory of another sovereign, but he acknowledged that, "in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive." *See also* The Hamilton (Old Dominion S.S. Co. v. Gilmore), 207 U.S. 398, 403 (1907) (asserting that state laws apply to a state's own citizens on the high seas); Hart v. Gumpach, 4 L.R.-P.C. 439, 463–64 (1872) (granting English courts jurisdiction to try actions for libel and other personal wrongs brought against British citizens living in China in the service of the Emperor of China); British S. Afr. Co. v. Companhia de Mocambique, 1893 A.C. 602, 624 (H.L. 1893) (asserting that the English court could inquire into an overseas title and award damages for any trespass committed).

107. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

108. *Id.* at 136–37.

109. *Id.* at 136 ("[A]ll sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers."); *see also* WHEATON, *supra* note 56, §§ 79, 113.

Moreover, a strict territoriality vision of the Constitution is difficult to reconcile with the constitutional text. The Constitution addresses the foreign affairs powers at length and expressly gives the United States authority to act with extraterritorial effect in declaring war,[110] defining and punishing crimes on the high seas,[111] granting letters of marque and reprisal,[112] making treaties,[113] and adjudicating claims involving foreign states and foreign nationals.[114] Other than the constitutional provisions that are expressly limited to actions within the states or within the United States, there is little reason to assume from the constitutional text that when the United States *acts* abroad, the constitutional principles of enumerated powers and limited government stop at the water's edge. Resort to strict territoriality as a limit on the Constitution's extraterritorial application thus required the Court to supplant traditional rules of textual construction with international law principles. Nevertheless, the Court's vision of strict territoriality strengthened in the latter part of the nineteenth century. The principle was visible in Justice Field's 1877 decision in *Pennoyer v. Neff* barring extraterritorial jurisdiction among the several states,[115] in the Court's 1897 development of the act of state doctrine,[116] and in Justice Holmes's 1909 decision in *American Banana* establishing the presumption against statutory extraterritoriality.[117]

Theories of strict territoriality often combined with enumerated powers-limited government or membership theories to constrain the application of the Constitution to both geographic regions *and* people. For example, limited government theories could combine with territoriality to hold that the Constitution constrained government action with respect to aliens within the United States but did not protect those outside the nation's borders seeking entry.[118] Territoriality in its most extreme form would confine both limited government and membership theories to the geographic United States, depriving even U.S. citizens outside the United States of constitutional

110. U.S. CONST. art. I, § 8, cl. 11.

111. *Id.* cl. 10.

112. *Id.* cl. 11.

113. *Id.* art. II, § 2, cl. 2.

114. *Id.* art. III, § 2, cl. 1.

115. Pennoyer v. Neff, 95 U.S. 714, 726 (1877).

116. Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.").

117. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

118. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 738 (1893) (Brewer, J., dissenting) (arguing that although the Constitution lacks extraterritorial effect, its constraints apply to actions within U.S. borders).

protections.[119] Conversely, territorial sovereignty could combine with membership theories to give the national government absolute authority over non-members who were *within* the country's territorial jurisdiction. For example, the government used the presence of Indians within U.S. territory to justify the exercise of federal power over them.[120] The power was assumed to be necessary for the United States to be a complete sovereign.

These enumerated powers-limited government, social contract-membership, and territoriality theories of the Constitution's scope appeared repeatedly throughout the nineteenth century and proved critical to the development of the inherent powers doctrine. The more restrictive the Court's vision of the Constitution's popular and geographic scope, the greater became the deconstitutionalized zone in which the government's inherent powers could operate. Territorial and membership conceptions, accordingly, were manipulated to support the exercise of national power. Indians were deemed subject to inherent, plenary congressional power due to their physical presence within U.S. territory. Residents of overseas territories were deemed subject to inherent, plenary power due to their non-membership and their physical presence *outside* the United States. And aliens, whether within or without the United States, were deemed subject to inherent, plenary congressional power over membership to determine the conditions under which aliens could enter or remain.

III. Inherent Power Over Indian Tribes

Supreme Court jurisprudence regarding Indian tribes is generally neglected in constitutional analysis, often on the grounds that the Indian cases are *sui generis*. Chief Justice Marshall observed in *Cherokee Nation v. Georgia* that "the relation of the Indians to the United States [was] marked by peculiar and cardinal distinctions which exist no where else."[121] Nevertheless, the nineteenth century Indian cases presented the same difficulties of applying constitutional text, and the concomitant reliance on international law, that the Court confronted in the alien and territory cases. From its earliest decisions, the Supreme Court established that national power over Indians derived in part from extraconstitutional, inherent powers relating to colonial discovery and the Indians' aboriginal status.[122] The doctrine of inherent powers which evolved in the Indian cases also proved important to the doctrine's development in the other two areas.

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119. *In re* Ross, 140 U.S. 453, 464 (1891).

120. United States v. Kagama, 118 U.S. 375, 379–80 (1886); United States v. Rogers, 45 U.S. (4 How.) 567, 571–73 (1846).

121. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

122. *E.g.*, *id.* at 22 (asserting that the discovery of the New World by the Europeans gave them the right of dominion including absolute appropriation and annexation of the territory); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

The first difficulty posed by the Indian cases was textual: the Constitution does not bestow any general power on the national government to regulate Indian affairs. Article IX of the Articles of Confederation had provided for the United States to exercise "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated . . . ."[123] This ambiguous proviso preserving some state authority over tribes became a source of controversy in the pre-constitutional era.[124] The Constitution eliminated the qualification and mentions Indians in only three places. The Commerce Clause authorizes Congress to "regulate commerce with foreign Nations, . . . [with the] States, . . . and with the Indian Tribes"[125] and provides the only express constitutional authority for Congress to legislate with regard to Indian tribes. Article I and the Fourteenth Amendment both exempt "Indians not taxed" from population enumerations for congressional apportionment, suggesting either that Indians are non-members or are separate sovereigns free from most congressional control.[126] Although the Territory Clause[127] might have been a plausible basis for U.S. authority over Indians in the western territories, as discussed in Part V, the scope and meaning of the elause was uncertain in the early part of the century, and was construed to exclude the western territories in *Dred Scott.* The other eonstitutional clauses applicable to early Indian relations were those associated with the foreign affairs powers, particularly the treaty and war powers.[128]

The absence of any express federal power to regulate internal Indian affairs is not surprising given that, when the Constitution was drafted, Indian tribes were highly autonomous and viewed as a serious external threat to the security of the new nation. Fear of Indian raids on the western frontier was a primary justification for the creation of a strong national defense under the new Constitution.[129] If not recognized as full sovereigns in the European

123. THE ARTICLES OF CONFEDERATION art. IX, cl. 4, *reprinted in* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 219 (1913).

124. THE FEDERALIST No. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961) ("The regulation of commerce with the Indian tribes is . . . unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory.").

125. U.S. CONST. art. I, § 8, cl. 3.

126. *Id.* art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

127. *Id.* art. IV, § 3, cl. 2.

128. *Id.* art. II, § 2, cl. 2 (treaty power); *id.* art. I, § 8, cl. 11–16 (congressional war powers); *id.* art. II, § 2, cl. 1 (Commander in Chief power).

129. THE FEDERALIST No. 24, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the need for garrisons on the western frontier to protect against "the ravages and depredations of the Indians"); THE FEDERALIST No. 25, at 163 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The territories of Britain, Spain, and of the Indian nations in our neighborhood . . . encircle the Union from Maine to Georgia."). Like the powers over foreign

sense, Indian tribes shared the respect due the nations of Europe as formidable external adversaries that could entangle the weak and fragile nation in expensive and protracted wars.[130] It was undisputed that most Indians were non-members of the American polity.[131] The tribes were similar to foreign states, and the three national powers of war, treaties, and commerce were considered to "comprehend all that is required for the regulation of our intercourse with the Indians."[132]

The Constitution viewed Indian *tribes* as subject to regulation pursuant to the Commerce and Treaty Clauses and the other foreign affairs powers of the national government. The Constitution, however, was silent regarding the position of the Indian as an *individual* other than to exclude members of Indian tribes from congressional apportionment and taxation. Could Indians be citizens? Were Indians "persons" entitled to due process and whose property could not be taken under the Fifth Amendment, or were Indians (unlike aliens) excluded from these protections? These questions remained unanswered through much of the nineteenth century.[133]

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relations, the Framers considered federal uniformity over Indian affairs necessary to prevent states from aggravating tribes and embroiling the nation in Indian wars. Even Anti-Federalists conceded that the national government's authority properly included "causes arising on the seas to commerce, imports, armies, navies, Indian affairs, [and] peace and war." Letter from the Federal Farmer to the Republican, I (Oct. 8, 1787), *available at* http://www.constitution.org/afp/fedfar01.htm.

130. FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 44 (1962) ("The country, precariously perched among the sovereign nations of the world, could not stand the expense and strain of a long drawn-out Indian war.").

131. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 641 (1982 ed.) ("Prior to 1871, most Indians were considered to be members of separate political communities and not part of the ordinary body politic of the states or of the United States."); *see also* Elk v. Wilkins, 112 U.S. 94, 112 (1884) (Harlan, J., dissenting) (arguing that at the Constitution's adoption, "Indians not taxed" were not part of the American polity, while Indians not members of any tribe were counted to establish representation in Congress and "constituted a part of the people for whose benefit the State governments were established"). *Cf.* Talton v. Mayes, 163 U.S. 376, 384 (1896) (finding that tribes, as sovereigns preexisting the Constitution, were not limited by the Fifth Amendment, which "had for its sole object to control the powers conferred by the Constitution on the National Government"); Lori F. Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 527–28 n.180 (1987) (outlining the argument that foreign states do not have rights protected by the Constitution).

132. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

133. Unlike aliens and territorial inhabitants, whose individual constitutional rights were addressed by the Supreme Court by the latter 1800s, the scope of constitutional protections available to individual Indians was very unclear. Nell Newton, for example, suggested that under the Court's analysis of the Fourteenth Amendment in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), tribal Indians might not have been within state jurisdiction for purposes of the Equal Protection Clause. *Newton, supra* note 52, at 216 n.109. A few state and lower federal court cases recognized Indians as persons entitled to habeas corpus, United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14,891) (finding that the term "person" within the habeas act "is comprehensive enough . . . to include even an Indian"), or recognized basic property rights for Indians under state law. *E.g.*, Mo. Pac. Ry. Co. v. Cullers, 17 S.W. 19 (Tex. 1891). The few cases considering individual rights claims of Indians were generally decided in state courts, due in large part to the fact that Indians not granted citizenship could not sue in federal court as aliens or citizens on diversity grounds, *cf.* Felix v. Patrick, 145 U.S. 317, 332 (1892)

A. Indians and Sovereignty under International Law

Prior to the Constitution's adoption, governmental relations with Indian tribes turned on international law concepts of Indian sovereign capacity.[134] If Indian tribes were sovereign nations, international law provided that relations with the tribes must be pursued through treaties, conquest, and the purchase of lands, as with other foreign sovereign powers.[135] They could not be governed, and their lands could not be taken, absent their conquest or consent.

The extreme competing view saw aboriginal peoples as heathens and savages who existed outside the realm of civilized nations and who had no sovereign or legal capacity. Under this view, which formed the basis of the so-called discovery doctrine, relations with the Indians could be conducted outside of the rules governing relations among civilized states. Their lands were deemed legally uninhabited or vacant (*territorium nullius*) and could be acquired by mere "discovery" and occupation.[136] A European power could unilaterally assert sovereign jurisdiction over Indians, because such assertions presented no conflicts between sovereign or territorial jurisdictions.

The discovery doctrine provided that the first European nation to discover a territory that was vacant or populated by aboriginal peoples

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(holding that, while Indians could not sue in federal court as citizens, they could sue in state court), and federal question jurisdiction was not granted to the federal courts until 1875. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The Court of Claims also lacked general jurisdiction over claims against the United States for takings based on Indian treaties. *See* Newton, *supra* note 52, at 217, 218 n.118.

134. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 17 (1942) ("[W]e must recognize that our Indian law originated, and can still be most clearly grasped, as a branch of international law . . . .").

135. M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 12 (1926). Fifteenth- and sixteenth-century natural law theorists, such as Francisco Victoria, Dominic Soto, and Heffter, held that any inhabitants that were organized into some type of polity were entitled to sovereign status. *Id.* at 12–15. On the other hand, Vattel and Blackstone concluded that lands occupied by populations that did not cultivate them were vacant and unoccupied, and subject to acquisition by occupation. VATTEL, *supra* note 56, bk. I, ch. VII, § 81, at 35–36, bk. I, ch. XVIII, § 209, at 99–100; 1 WILLIAM BLACKSTONE, COMMENTARIES *107–08; *accord Worcester*, 31 U.S. at 579 (McLean, J., concurring) (discussing "[t]he abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence").

136. *See, e.g.*, T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW § 93 (1895) (reprinted 1987) ("All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation. The rights of the natives are moral, not legal."); LASSA FRANCIS & LAWRENCE OPPENHEIM, 1 INTERNATIONAL LAW § 221 (2d ed. 1912) ("Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited . . . or inhabited by natives whose community is not to be considered as a State."); JOHN WESTLAKE, INTERNATIONAL LAW, pt. I, at 92–103 (1904) (detailing the Roman doctrine of *res nullius* as a means of possession through occupation and the use of the doctrine in claims in the New World); *see also* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 24 (1999) ("In its most extreme form, positivist reasoning suggested that relations and transactions between the European and non-European states occurred entirely outside the realm of law.").

acquired complete dominion over the region, and that dominion must be recognized and respected by other European states.[137] International law scholars of the fifteenth and sixteenth centuries developed this doctrine to accommodate European expansionism and the assertion of European sovereignty over non-European peoples.[138] The discovery doctrine turned on the assumption, as Wheaton later wrote, that "the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors."[139] The doctrine was controversial, however, and the extreme view of the discovery doctrine was not universally accepted even during the early colonial period. In 1532, for instance, Francisco de Victoria advised the Emperor of Spain that title over the lands of the New World could lawfully be acquired only through purchase, with the aborigines' voluntary and informed consent.[140] From this perspective, "discovery" simply regulated competition among European powers and established no rights over native inhabitants. "What the discoverer's State gained was the right, as against other European Powers, to take the steps which were appropriate [under international law] to the acquisition of the territory in question."[141]

The doctrine of discovery also quickly fell into disfavor as European powers asserted competing claims to vast regions of the globe merely as a result of landing on or, in some cases, simply sighting, their shores.[142] Abuse by competing colonial powers led to the erosion of the doctrine, and by the 1800s, discovery, unaccompanied by effective possession of the territory through cession, conquest, occupation, or settlement, generally was in-

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137. FRANCIS & OPPENHEIM, *supra* note 136, § 223 ("In the age of the discoveries, States maintained that the fact of discovering a hitherto unknown territory was sufficient reason for considering it as acquired . . . .").

138. LINDLEY, *supra* note 135, at 24.

139. WHEATON, *supra* note 56, § 166, at 202; *see also* Robert T. Coulter & Steven M. Tullberg, *Indian Land Rights*, *in* THE AGGRESSIONS OF CIVILIZATION 185, 190 (Sandra C. Cadwalader & Vine Deloria, Jr. eds., 1984).

140. FRACISCUS VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 148 (Ernest Nys ed., John Pawley Nate trans., Carnegie Inst. of Wash. 1917) (1696).

141. LINDLEY, *supra* note 135, at 26. *See also* THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 53, at 79 (3d ed. 1874) (noting that a claim based on discovery "was good only against those who acknowledged such right of discovery, but not against the natives"); FRANCIS & OPPENHEIM, *supra* note 136, § 223 ("[D]iscovery gives to the State . . . an *inehoate* title; it acts as a temporary bar to the occupation by another State . . . ." (citation omitted)).

142. Chief Justice Marshall acknowledged that claims to dominion based on discovery, without more, were often challenged by other European countries. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574–84 (1823) (discussing competing claims arising from the doctrine of discovery); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546 (1832) ("[T]hough the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest."). The plaintiff tribe in *Cherokee Nation v. Georgia* also challenged the pretension that "a ship manned by the subjects of the king having, 'about two centuries and a half before, sailed along the coast of the western hemisphere . . . and looked upon the face of that coast without even landing on any part of it'" somehow limited the tribe's rights to the lands of Georgia. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 3–4 (1831) (statement of the case).

sufficient to establish a title that would be recognized by other European powers.[143] Indeed, both during the colonial period and afterwards, most U.S. lands were acquired from the Indians through cession and purchase, rather than through either discovery or conquest.[144]

B. The Doctrine of Discovery and The Marshall Court

During the colonial period and the early constitutional era, relations with Indian tribes were largely treated as matters of foreign relations, governed by the constitutional treaty and war powers. Both the British and the Continental Congress pursued relations with the Indians through treaties.[145] Early treaties with the Cherokee and Delaware even provided for tribal representation in Congress through nonvoting delegates, though these provisions were never carried out.[146] The principle that Indian treaties required formal ratification in the same manner as European treaties was established by President Washington with the Fort Haramar Treaty of 1789, overcoming Senate objections that treaties with aborigines did not require the solemnities afforded to treaties with European sovereigns.[147]

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143. *See* Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 651–53 (1978); LAWRENCE, *supra* note 136, § 92, at 144 ("[I]n modern times few, if any, authorities would be prepared to say that a good title to territory could be based by a state upon the bare fact that its navigators were the first to find the lands in question."); FRANCIS & OPPENHEIM, *supra* note 136, § 294 (stating that discovery, without effective occupation, is no longer a valid means of acquiring territory); *see also* Jones v. United States, 137 U.S. 202, 212 (1890) (noting that discovery *and occupation* gives dominion under the law of nations).

144. *Worcester*, 31 U.S. at 580 (McLean, J., concurring) ("The occupancy of [Indian] lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration."); COHEN, *supra* note 131, at 55 ("For all practical purposes, the Indians were treated [during the colonial era] as sovereigns possessing full ownership rights to the lands of America."); Berman, *supra* note 143, at 648 ("The historical record is quite clear that most of the lands alienated to the United States were acquired by purchase rather than by warfare."); Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34–35, 45–46 (1947).

145. COHEN, *supra* note 131, at 57–58 (discussing treaty practices).

146. Article VI of the 1778 Delaware treaty provided:

> It is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: . . .

Treaty with the Delawares, Sept. 17, 1778, U.S.-Del. Nation, art. VI, 7 Stat. 13, 14. Article XII of the Treaty of Hopewell with the Cherokee Nation also gave the tribe a right "to send a deputy of their choice" to Congress. Treaty with the Cherokees, Nov. 28, 1775, U.S.-Cherokee Nation, art. XII, 7 Stat. 18, 20.

147. Washington sent the treaty to the Senate for ratification, but the Senate adopted a resolution advising the President to execute the treaty without ratification. Washington maintained that the Senate should give its formal advice and consent to ratification, as it did with treaties involving European powers. The Senate did so, despite an earlier Senate committee report concluding that formal ratification of Indian treaties was not required. 1 ANNALS OF CONG. 80–84 (Joseph Gales ed., 1789). *See* COHEN, *supra* note 131, at 71.

1. Johnson v. M'Intosh.—U.S. inherent authority over Indian tribes has its roots in the doctrine of discovery set forth by Chief Justice Marshall in the 1823 case of *Johnson v. M'Intosh*.[148] The case involved a title dispute between private land speculators and the U.S. government over former tribal lands.[149] The litigants framed the dispute as turning on the nature of Indian sovereignty. If Indians were full sovereigns, their initial sale to the private land speculators was valid. If not, then the Indians' ability to alienate their traditional lands was qualified, and the United States' title would prevail.[150]

The oral argument focused largely on the international law capacity of Indians to possess and transfer property as sovereigns. Daniel Webster argued for the plaintiffs that the question of aboriginal sovereignty was not presented, though he assumed that "their title by occupancy is to be respected, as much as that of an individual . . . in a civilized state."[151] Indian authority to sell property had been recognized by various European treaties and purchases by the United States, so the only question in the case, according to Webster, was the ability of Indians to sell to private individuals.[152] The defendants, on the other hand, maintained that Indians, as aboriginal peoples, were incapable of sovereignty. Invoking prominent international law writers such as Vattel, Grotius, Marten, and Pufendorf in support of their position, the defendants argued that Indians lived as nomads in a state of nature, were not members of the general society of nations, and could not hold title to land under any established legal authority.[153] Indians could not be citizens of the United States because they were "destitute of the most essential rights which belong to that character." They instead were merely "perpetual inhabitants with diminutive rights."[154] The defendants further contended that European discovery stripped the Indians of any land rights

148. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

149. WILKINS, AMERICAN INDIAN SOVEREIGNTY, *supra* note 52, at 29. Land speculators, including Johnson, had purchased the lands in 1775 from the Illinois and Piankeshaw tribes at a public auction at a British military post which was ratified by British officers. *M'Intosh*, 21 U.S. at 550–58 (statement of the case). The tribe subsequently ceded the same lands to the United States, who in turn sold them to M'Intosh. *Id.* at 593–94.

150. *See id.* at 572. As formulated, the case presented a difficult conceptual problem for the Court. If the Indians were found to hold legal title to their lands, as full foreign sovereigns, the ruling would invalidate large grants of Indian-held lands made to settlers by the British Crown without tribal consent. It would also eliminate the U.S. government's power to control the disposition of Indian lands, thus exposing Indian holdings to unscrupulous land speculators. On the other hand, a ruling that the tribe did not hold title to the lands would contradict existing treaty provisions that vowed to respect Indian property rights and potentially threaten U.S. title to large tracts of land that had been ceded to the United States through Indian treaties. *Cf.* Newton, *supra* note 52, at 208 n.69 (describing Chief Justice Marshall's "Doctrine of Discovery" as a compromise to satisfy these competing interests).

151. *Johnson*, 21 U.S. at 563 (argument for plaintiffs).

152. *Id.* at 562–63 (argument for plaintiffs).

153. *Id.* at 567 n.a, 569 n.b (argument for defendants).

154. *Id.* at 569 (argument for defendants).

they previously held.[155] The sovereignty acquired by the nations of Europe through discovery "necessarily preclude[d] the idea of any other sovereignty existing within the same limits."[156]

Chief Justice Marshall accordingly interpreted the case as presenting the question of "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country."[157] Marshall declined to embrace the defendants' extreme view of Indian non-sovereignty. Instead, he crafted a compromise that would, to some degree, protect both the interests of the national government and those of the tribes. Marshall first acknowledged the Indians' sovereign right to possess their land "and to use it according to their own discretion."[158] Their "rights to complete sovereignty, as independent nations," however, had been diminished by European discovery.[159] According to Marshall, the international law doctrine of discovery—"that discovery gave exclusive title to those who made it"[160]—gave the first European power to discover new lands an exclusive right, as against other European nations, to "acquir[e] the soil from the natives, and establish[] settlements upon it."[161] The principle was developed to resolve territorial disputes among European powers, and discovery established "a right with which no Europeans could interfere."[162] Discovery rendered the natives' title imperfect by limiting the Indians' ability to alienate their lands to only the discovering power.[163] Indians, in other words, could sell their lands only to the United States, and the United States had an "exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[164]

Drawing upon membership theory, Marshall elaborated that the "excuse, if not justification," for this doctrine lay in "the character and habits" of the Indians.[165] The Indians were "fierce savages" who were incapable of being incorporated into the American polity.[166] Although ordinarily conquest did not deprive existing inhabitants of their land rights, this rule did not pertain where, as here, the inhabitants were "a people with whom it was impossible to mix, and who could not be governed as a distinct society."[167] Indians, then, did not share the property rights enjoyed by "civilized" whites.

155. *Id.* at 567–68 (argument for defendants).
156. *Id.* at 568 (argument for defendants).
157. *Id.* at 572.
158. *Id.* at 574.
159. *Id.*
160. *Id.*
161. *Id.* at 573.
162. *Id.*
163. *Id.* at 574.
164. *Id.* at 587.
165. *Id.* at 589.
166. *Id.* at 590.
167. *Id.* at 590–91.

Chief Justice Marshall concluded that however this result might offend "the usages of civilized nations,"[168] it was a political question that the courts were powerless to examine. The U.S. claim to absolute title being long recognized, Marshall held, "It is not for the courts of this country to question the validity of that title, or to sustain one which is incompatible with it."[169]

Chief Justice Marshall did not expressly cite any international law authorities. In fact, his opinion is nearly devoid of citation support. His invocation of the doctrine of discovery is also problematic from an international law perspective. As noted above, the discovery doctrine had fallen into disfavor, even among European powers, by the time Marshall wrote.[170] The opinion appears motivated more out of a sense of necessity than an effort to accurately represent international law. The Indians' differential treatment, Marshall reasoned, resulted from "inevitable necessity"[171] and the "superior genius" of European society.[172] The alternative to enforcing European claims over them had been to "abandon[] the country" and "leave [it] . . . a wilderness."[173] The Court, in fact, was simply enforcing the de facto situation:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected . . . but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensible to that system under which the country has been settled, . . . it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[174]

The Chief Justice's opinion contained an internal ambiguity regarding Indian sovereignty that played out throughout the Marshall trilogy. It is unclear in *M'Intosh* whether Marshall intended to place absolute sovereign title in the United States over all Indian lands. Marshall repeatedly stated that discovery gave an "exclusive right to extinguish" Indian title to the

168. *Id.* at 591.

169. *Id.* at 589; *see also id.* at 591–92.

170. Furthermore, the United States had acquired most of its claim to U.S. lands through purchase, not discovery or conquest. *See* sources cited *supra* note 144.

171. *M'Intosh*, 21 U.S. at 590.

172. *Id.* at 573.

173. *Id.* at 590.

174. *Id.* at 591–92.

discovering power.[175] The opinion is ambiguous, however, as to the *means* of extinguishing title. Marshall frequently describes the right as an "exclusive right to *purchase*" Indian lands, precluding purchase by other European nations or private individuals.[176] Under this approach, Indians remained "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it."[177] Their sovereignty was diminished only in the sense that if they *chose* to alienate the property, they could sell only to the discovering power. This interpretation would be consistent with Victoria's view that discovery at most created a preemptive right against other European powers.[178]

Chief Justice Marshall also maintained, however, that discovery gave the European power "absolute," "exclusive title," "ultimate dominion," and "a right to such a degree of sovereiguty, as the circumstances of the people would allow them to exercise."[179] He claimed that discovering powers had consistently exercised "a power to grant the soil, while yet in the possession of the natives."[180] These passages suggest that discovery gave the United States sovereign authority over the Indians *without* Indian consent, with the Indians' right to occupancy existing solely as a matter of grace and power. At any rate, as Professor Berman has observed, "the ambiguity of the Court's reasoning in *Johnson* on the nature of aboriginal rights was fundamental and extreme."[181]

M'Intosh established that U.S. authority over tribes, or at least the United States' exclusive right to acquire Indian property, originated from two sources: colonial prerogatives deriving from discovery, and the nature of Indians as savages and incomplete sovereigus. Neither of these sources was based on the text of the Constitution. Instead, the U.S. powers rcsulting from discovery and the Indians' aboriginal status were original, inherent powers, arising from international law. By deriving U.S. authority over the Indians from an extraconstitutional source and suggesting that Congress's exercisc of the power was inappropriate for judicial review, *Johnson v. M'Intosh* laid the groundwork for the doctrine of inherent powers to come.

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175. *See, e.g., id.* at 585, 587, 592.

176. *Id.* at 585 (emphasis added); *see also id.* at 587 (noting that discovery gives the right to acquire through "purchase or by conquest"); Berman, *supra* note 143, at 645–46. Marshall himself appeared to believe that most Indian lands were acquired by conquest. *See M'Intosh*, 21 U.S. at 589–90 (stating that European countries obtained title to land by conquest and maintained the claim by force). Later cases from the Marshall era also suggest that the Chief Justice may not have intended to give the United States absolute title but only "the exclusive right of purchasing such lands as the natives were willing to sell." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544, 545 (1832); *see also* Newton, *supra* note 52, at 208, 209 & n.70.

177. *M'Intosh*, 21 U.S. at 574.

178. VICTORIA, *supra* note 140.

179. *M'Intosh*, 21 U.S. at 587.

180. *Id.* at 574, 576, 592.

181. Berman, *supra* note 143, at 659.

2. The Cherokee Cases.—The two competing views of Indian sovereignty and U.S. power encompassed by the *M'Intosh* decision were further elaborated in the other two cases of the Marshall trilogy: the Cherokee cases of *Cherokee Nation v. Georgia*[182] and *Worcester v. Georgia.*[183] *Cherokee Nation* emphasized the view of Indians as dependent subjects, while *Worcester* stressed their independent status as separate sovereigns. The cases arose from an acrimonious conflict between the Cherokee Nation, which numbered among the "Five Civilized Tribes,"[184] and white citizens of Georgia, who sought the Cherokee's expulsion from the State.[185] In the late 1820s the Georgia legislature took matters into its own hands, by invalidating all Cherokee laws and extending Georgia's jurisdiction over the Cherokee territory.[186] By the time *Cherokee Nation* came to the Court, the Governor of Georgia had seized gold mines in the Cherokee territory by force.[187] Georgia enforced its criminal laws against a Cherokee in Indian territory, and the Georgia legislature ordered the Indian hanged, in defiance of a writ of error to the U.S. Supreme Court.[188] Georgia invoked sovereign immunity in the litigation and refused to appear before the Court in either case.[189]

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182. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

183. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

184. The Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of the Southeastern U.S. comprised the so-called "Five Civilized Tribes," who, together with the Pueblo, were viewed as having more advanced societies and being more capable of living compatibly with Western society than other nomadic, pagan tribes. WILKINS, AMERICAN INDIAN SOVEREIGNTY, *supra* note 52, at 13. The Cherokee embraced early U.S. efforts to domesticate the Indian tribes, including adopting an agrarian lifestyle and developing a system of education, a government of separated powers, and a constitution modeled on that of the United States. *Cherokee Nation*, 30 U.S. at 6 (statement of the case); *id.* at 21 (noting that the Cherokee Nation government "must be classed among the most approved forms of civil government"); *Worcester*, 31 U.S. at 581, 587–88 (McLean, J., concurring) (contrasting the Cherokee with other "savage" tribes). *See generally* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

185. *Cherokee Nation*, 30 U.S. at 9. Georgia's 1802 cession of its western territory to the United States was conditioned on a promise that the U.S. government would extinguish Indian title within Georgia, through reasonable and peaceful means, as soon as possible. 28 Am. St. Papers, Public Lands vol. 1, 7th Cong., 1st Sess. 126 (1802); *see also Worcester*, 31 U.S. at 586–87 (McLean, J., concurring). The Cherokee Nation held their lands by treaty, however, and had little interest in accepting the United States' offers of voluntary removal to western lands. PRUCHA, *supra* note 130, at 227–28; Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 503 (1969).

186. *Cherokee Nation*, 30 U.S. at 7–8 (statement of the case). The State intended to distribute the Cherokee lands by lottery to the people of Georgia. *Id.* at 13 (statement of the case).

187. *Id.* at 14 (statement of the case).

188. *Id.* at 12–13 (statement of the case); *see also* Burke, *supra* note 185, at 513.

189. *Cherokee Nation*, 30 U.S. at 14; Burke, *supra* note 185, at 513. The Cherokee sought support from the federal government, but the Jackson administration, which was a strong proponent of the Indians' segregation and western removal, informed them that the President "ha[d] no power to protect them against the laws of Georgia," *Cherokee Nation*, 30 U.S. at 9, and local federal troops indicated that they would cooperate with Georgia's enforcement efforts. *Id.* at 10; *see also* GRANT

Cherokee Nation involved a direct suit by the tribe for injunctive relief against Georgia's actions. The case presented the threshold question of whether Indian tribes constituted "foreign states" within the meaning of the Court's original Article III jurisdiction.[190] The Cherokee alleged that individual Indians were aliens,[191] and that the tribe was entitled to sue in federal court as a "sovereign and independent state[]; possessing both the exclusive right to [its] territory, and the exclusive right of self-government within that territory."[192] The tribe contended that U.S. statutes and treaties recognized the tribe's sovereign status.[193]

The Court dismissed the case on jurisdictional grounds. In an "Opinion for the court" which only Justice McLean joined,[194] Chief Justice Marshall found that while the Cherokee had the character of "a state, as a distinct political society,"[195] the tribe was "not a foreign state" within the meaning of Article III, and thus could not sue in U.S. courts.[196] Marshall invoked the narrow interpretation of the discovery doctrine, that the Indians held an "unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."[197] The tribe nevertheless resided "within the jurisdictional limits of the United States" and its territory "compose[d] a part of the United States."[198] Thus, they were a "domestic dependent nation[]" occupying "a territory to which we assert a title independent of their will."[199] Marshall likened the Indians' relation to the United States as "that of a ward to his guardian."[200] Indeed, the tribes

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FOREMAN, INDIAN REMOVAL 231–32 (1932) (discussing Jackson's refusal to provide federal support for the Cherokee tribe in Georgia). The tribe instead sought relief from the United States Supreme Court at the urging of Daniel Webster and other Jackson opponents. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 717 (1988).

190. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *id.* art. III, § 2, cl. 2 (permitting the Court to exert original jurisdiction over cases in which a state is a party).

191. *Cherokee Nation*, 30 U.S. at 16.

192. *Id.* at 4 (statement of the case). The tribe's pleading stated that the Cherokee Nation was a "a foreign state, not owing allegiance to the United States, nor to any state of this Union, nor to any prince, potentate or state, other than their own." *Id.* at 3 (statement of the case) (quotations omitted).

193. *Id.* at 5, 7 (statement of the case).

194. Marshall wrote on behalf of himself and Justice McLean. Justices Johnson and Baldwin concurred in the judgment. Justiees Thompson and Story dissented, and Justice Duval did not participate. WHITE, *supra* note 189, at 724.

195. *Cherokee Nation*, 30 U.S. at 16 ("[The Cherokee] have been uniformly treated as a state, from the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community . . . . The acts of our government plainly recognise the Cherokee nation as a state . . . .").

196. *Id.* at 20.

197. *Id.* at 17.

198. *Id.*

199. *Id.*

200. *Id.*

were "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them [by a foreign state] would be considered . . . an act of hostility."[201] Without explaining how the United States had acquired sovereignty over their lands, Marshall concluded that the physical presence of the Indians within U.S. borders precluded their status as a "foreign state."[202] He also contended that the Commerce Clause, in distinguishing between Indians and foreign states, made clear that the tribes were not foreign sovereigns within the meaning of the Constitution.[203] Thus, the federal courts were unavailable to rectify wrongs against the tribes.[204]

The decision in *Cherokee Nation* crippled the ability of tribes to sue in U.S. courts, and placed Indians—like free blacks under *Dred Scott*[205]—in a "no-man's land" status of being neither citizens of the United States nor aliens of a sovereign foreign state. Marshall's characterization of the federal-Indian relationship as that of guardian and ward, based on Indian presence within U.S. borders, would also later be used to justify expansive federal power.[206]

Chief Justice Marshall's opinion veiled a sharp disagreement among members of the Court over the legal capacity of Indians that presaged the Court's division over the legal status of free blacks and their ability to sue that appeared in *Dred Scott* two decades later. The concurring Justices, Johnson and Baldwin, were overtly hostile to the Indians' claim.[207] Justice Johnson adopted membership theories to stress the extreme non-sovereign view of Indians. Indians were "hunter horde[s],"[208] who occupied their lands purely as a matter of grace.[209] "[H]ow then can they be said to be recognised as a member of the community of nations?" Justice Johnson asked.[210]

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201. *Id.* at 17–18.

202. *Id.* at 18.

203. *Id.* at 18–19.

204. *Id.* at 20 ("If it be true, that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true, that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.").

205. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

206. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 382–84 (1886) (upholding federal criminal jurisdiction over Indian tribes); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (upholding federal criminal jurisdiction over a crime by a U.S. citizen who had been accepted as a member of the Cherokee Tribe).

207. *Cherokee Nation*, 30 U.S. at 21–22 (Johnson, J., concurring); *id.* at 32–33 (Baldwin, J., concurring). Justice Baldwin made express his purpose of avoiding recognizing individual Indians as "aliens, capable of suing in the Circuit Courts." *Id.* at 32 (Baldwin, J., concurring).

208. *Id.* at 28 (Johnson, J., concurring).

209. *Id.* at 24 (Johnson, J., concurring).

210. *Id.* (Johnson, J., concurring).

"Would any nation on earth treat with them as such?"[211] He concluded that the Constitution underscored the Indians' aboriginal status:

> I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes . . . which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.[212]

Both Justices Baldwin and Johnson assumed the United States enjoyed absolute sovereignty over the tribes. Justice Baldwin rejected the claim that discovery only established rights among Europeans, finding that the *M'Intosh* opinion on this point was "too explicit to be misunderstood."[213] Foreshadowing the Court's later cases involving both Indians and territories, Baldwin portrayed the Territory Clause of the Constitution as giving Congress plenary power over all Indians within U.S. borders. According to Baldwin, the "territory" in this clause referred "to the formation of a government whose laws and process were in force within its whole extent, without a saving of Indian jurisdiction."[214] The Clause, he reasoned, "leaves the jurisdiction and sovereignty of the Indian tribes wholly out of the question. *The power given . . . is of the most plenary kind.*"[215]

In a dissent solicited by the Chief Justice,[216] Justices Thompson and Story took the opposite view, contending that the Indian tribes were full foreign states capable of invoking the Court's original jurisdiction. Justice Thompson argued that international law recognized the ability of less powerful sovereigns to seek the protection of another,[217] and that the Indians were "foreign states" both within the meaning of international law and the Constitution.[218] The Indians had always enjoyed "exclusive dominion" and "self-government" over their lands,[219] and if they are foreign states for the purposes of entering treaties with the United States, they should be foreign states for the purposes of enforcing the treaty terms.[220] He rejected the

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211. *Id.* (Johnson, J., concurring).

212. *Id.* at 27–28 (Johnson, J., concurring).

213. *Id.* at 49 (Baldwin, J., concurring).

214. *Id.* at 44 (Baldwin, J., concurring).

215. *Id.* (Baldwin, J., concurring) (emphasis added).

216. Marshall requested that Thompson write the dissent, in response to the Johnson and Baldwin opinions. WHITE, *supra* note 189, at 730.

217. *Cherokee Nation*, 30 U.S. at 53 (Thompson, J., dissenting) (citing VATTEL, *supra* note 56, bk. I, ch. I, §§ 4–8, at 2–3).

218. *Id.* at 53–56, 80 (Thompson, J., dissenting).

219. *Id.* at 53–55 (Thompson, J., dissenting) ("[T]he principle is universally admitted, that this occupancy belongs to them as a matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent . . . .").

220. *Id.* at 58–59 (Thompson, J., dissenting).

suggestion that Indians could be neither citizens nor aliens. "[I]f not citizens, they must be aliens or foreigners . . . ."[221]

The *Cherokee Nation* case thus reflected a stark divide between the concurring Justices, who believed that Indians lacked sovereignty and were subject to absolute United States authority,[222] and the dissenters, who viewed tribes as full sovereigns over whom the United States exercised no inherent authority and with whom relations should be conducted by treaty.[223] The opinion of Chief Justice Marshall, which characterized the Indians as "domestic dependent nations," straddled these positions.[224]

3. Worcester v. Georgia.—*Cherokee Nation* ended challenges by the tribe to Georgia's policies, but the merits of the claim returned to the Court the following term in *Worcester v. Georgia.*[225] The plaintiffs in error, Samuel Worcester and Elizur Butler, were missionaries sent by the federal government to teach Christianity to the Cherokee Nation.[226] The State of Georgia prosecuted them for violating a state law that prohibited whites from residing in Cherokee territory without a state license and sentenced them to four years hard labor.[227] The missionaries declined an offer of pardon and appealed to the U.S. Supreme Court, arguing that the federal rights of the Cherokee Nation invalidated the Georgia statute.[228] While *Cherokee Nation* had addressed the ability of the tribe to sue in U.S. courts as a foreign sovereign, *Worcester* presented an alternative formulation, claiming that "a citizen of the United States has been deprived of his liberty" by the state of Georgia.[229] The case presented a struggle between state and national authority over the Indian tribes. Lacking a jurisdictional escape route, the Court adjudicated the merits of the Indians' rights despite the absence of any tribal member as a party.

Writing again for the Court, Chief Justice Marshall significantly modified the view that he set forth in *M'Intosh* and *Cherokee Nation.* Marshall offered a resounding affirmation of Indian sovereignty: "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[230] "The Indian nations," the Chief Justice wrote, "had always

221. *Id.* at 66 (Thompson, J., dissenting).
222. *Id.* at 27–28 (Johnson, J., concurring); *id.* at 47–48 (Baldwin, J., concurring).
223. *Id.* at 80 (Thompson, J., dissenting).
224. *Id.* at 17.
225. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
226. *Id.* at 528–29 (statement of the case).
227. *Id.* at 529, 532 (statement of the case).
228. *Id.* at 535 (argument for petitioner).
229. *Id.* at 595–96 (McLean, J., concurring).
230. *Id.* at 542–43.

been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate . . . ."[231]

Marshall ridiculed the "extravagant and absurd idea" that discovery gave European states any power over the preexisting tribes.[232] Instead, the doctrine of discovery

> was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession . . . as aboriginal occupants.[233]

Discovery, and the colonial charters that ensued, simply gave "the exclusive right of purchasing such lands as the natives were willing to sell."[234] The Chief Justice thus affirmed the narrow reading of *M'Intosh*, that discovery simply resolved rights between Europeans,[235] and it did not alter the rights of native tribes who had not consented.[236]

Marshall found that both Great Britain and the United States had always treated the Indians as sovereigns and had never attempted to interfere with internal Indian affairs.[237] Marshall emphasized that relations with Indians were the exclusive province of the national government, and were conducted in the same manner as all other foreign relations. "The Constitution," he reasoned, "by declaring treaties . . . to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."[238] Citing Vattel, Marshall observed that under the law of nations, the acceptance by a weaker state of a stronger state's protection did not surrender the weaker power's independence and right to self-government or terminate its existence as a state.[239] Thus, Indian sovereignty barred any

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231. *Id.* at 559.

232. *Id.* at 544.

233. *Id.*

234. *Id.* at 545; *see also id.* at 546 ("[Royal charters] asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.").

235. *Id.* at 543.

236. *Id.* at 544.

237. *Id.* at 547–49.

238. *Id.* at 559. *See also id.* at 559–60 ("The words 'treaty' and 'nation' . . . [have been applied] to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.").

239. *Id.* at 561.

intervention into Cherokee affairs by the State of Georgia and required judgment for the plaintiffs.[240]

Marshall could have resolved the case by recognizing an exclusive federal power to regulate Indian affairs that preempted any state interference. His conclusion that Georgia's laws were invalid, however, rested not on the scope of federal power, but primarily on the sovereign independence of the Cherokee tribe from both the United States *and* Georgia.

The Cherokee cases are important for introducing the Constitution into the Marshall Court's analysis of federal-Indian relations. While *M'Intosh* focused exclusively on the international law basis for U.S. rights of purchase, *Cherokee Nation* suggested that U.S. relations with the Indians were governed by the Constitution: Because tribes did not constitute "foreign states" within the meaning of the Constitution, they could not sue in federal court.[241] *Worcester* further established that the Constitution barred states from interfering with Indian relations and that the relationship between the federal government and the Indians was governed by the War, Treaty, and Commerce Clauses, which "comprehend all that is required for the regulation of our intercourse with the Indians."[242] To the extent the government enjoyed extraconstitutional authority over the tribes, that power was limited to an exclusive power of consensual purchase. It did not include authority to intervene in internal Indian affairs.[243]

Thus, by the time of the decision in *Worcester*, two sets of legal doctrines shaped U.S.-Indian relations: international law doctrines regarding Indian sovereignty and discovery; and constitutional doctrines regarding federalism and the national government's enumerated powers. Chief Justice Marshall did not explore the relationship between these two regimes, but his decision in *Worcester* suggested that the enumerated constitutional clauses encompassed the totality of federal power over the Indians. The decisions in the Marshall trilogy established the ambiguous position of the Indians as extraconstitutional quasi-sovereigns, subject to U.S. foreign relations powers, who were also domestic dependents of the United States. It would be Marshall's successor, Chief Justice Taney, who would first transform the Marshall Court's delicate compromise between U.S. and Indian sovereignty into a doctrine of inherent plenary power.

The decision in *Worcester* provoked what Supreme Court historian Charles Warren declared to be "the most serious crisis in the history of the

240. *Id.* ("The Cherokee nation, then, is a distinct community occupying its own territory, . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter . . . .").

241. *Cherokee Nation*, 30 U.S. at 20.

242. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

243. *Id.*; *accord* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835) (stating that the Indian "right of occupancy is considered as sacred as the fee simple of the whites").

Court."[244] Georgia refused to release the missionaries, and President Jackson took no steps to enforce the Court's order.[245] The Governor of Georgia ultimately pardoned the missionaries under pressure from Jackson supporters who wished to avoid embarrassing the President.[246] In 1838, however, the federal government resolved the conflict with Georgia by forcibly removing 12,000 Cherokees west of the Mississippi pursuant to a treaty hastily negotiated with a faction of the tribe.[247] The forced removal of the Cherokee Nation stood as testament to the executive branch's view of federal power over the Indians. It was perhaps an early warning that in a rapidly growing and land-hungry nation, the Court's solicitous view of Indian sovereignty would be short-lived.

C. The Taney Court and U.S. Criminal Jurisdiction

Federal regulation of crimes committed by Indians in Indian country[248] became an important battleground for the inherent powers doctrine. Through the first half of the nineteenth century, federal criminal legislation, like commercial legislation, reflected the premise that Congress could regulate interactions between whites and Indians, but that tribes retained control over conduct between Indians in Indian territory. Until 1871, statutes and treaties generally preserved tribal jurisdiction over even the most serious crimes if both the perpetrator and the victim were Indians.[249]

In 1817, Congress adopted legislation extending U.S. criminal laws to Indians who committed crimes against non-Indians within Indian territory.[250]

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244. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 189 (1923).

245. Jackson was attributed with stating, "John Marshall has made his decision; now let him enforce it." *Id.* at 219; COHEN, *supra* note 131, at 83 & n.173. It is unclear, however, whether Jackson's inaction was the result of active defiance of the Court or procedural difficulties with achieving compliance. 2 WARREN, *supra* note 244, at 217–25.

246. *See* Burke, *supra* note 185, at 530 (explaining that Butler and Worcester eventually dropped their case in exchange for the Governor's pardon, yielding to pressure from Jacksonians and their own attorneys, who sought to present a united front against the now more important issue of nullification); WHITE, *supra* note 189, at 737–38.

247. Treaty with the Cherokees, Dec. 29, 1835, U.S.-Cherokee Nation, 7 Stat. 478. Four thousand Cherokees died during the trek. FOREMAN, *supra* note 189, at 312 n.31.

248. "Indian country" was defined in the 1834 Trade and Intercourse Act as those lands in the United States, not within any state or the territory of Arkansas, "to which Indian title [had] not been extinguished." Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, *repealed by* Rev. Stat. § 5596 (1874). *See* COHEN, *supra* note 131, at 30–31.

249. Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historieal Perspeetive*, 17 ARIZ. L. REV. 951, 957–62 (1975) (discussing jurisdiction during the treaty period). The first trade and intercourse act of 1790 established federal criminal jurisdiction over non-Indians who committed crimes within Indian boundaries, while a 1796 act introduced complementary federal criminal jurisdietion over Indians who committed certain federal crimes *outside* of tribal boundaries. *Id.* at 958–59 (discussing early criminal legislation).

250. Act of Mar. 3, 1817, ch. 92, §§ 1–2, 3 Stat. 383 (1817), *repealed by* Act of June 30, 1834, § 29, 4 Stat. 729, 734 (1834). Section One of the Act provided for general federal criminal jurisdiction over crimes in Indian territories committed by "any Indian, or other person," but Section

The limits of congressional power over the tribes were tested in the 1834 circuit court case of *United States v. Bailey*, which challenged the 1817 Act as unconstitutional to the extent that it authorized the United States to try crimes committed between whites in Indian territory *within a state*.[251] The case considered first, whether Congress's Commerce Clause authority extended to the regulation of Indian crimes, and, if so, whether that authority authorized federal regulation of crimes between whites in Indian territories that were located within a state.

Justice McLean, sitting as circuit judge, struck down the Act of 1817 in a rare application of stringent enumerated powers analysis to the federal Indian authority.[252] McLean rejected the possibility that the legislation could be upheld under the United States' authority over the territories, which he held did not extend to Indian country within the states.[253] He then rejected the Indian Commerce Clause as a basis for congressional authority, finding that the crime charged bore no relation to trade with the Indians.[254] The case arose as the debate over the scope of the Interstate and Foreign Commerce Clauses was becoming entangled in the slavery debate,[255] and Justice McLean expressed concern about the implications of the proposed construction of the Indian Commerce Clause:

> Under the power to regulate commerce with the Indian tribes, there is undoubtedly a wide scope for legislation . . . .
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> . . . But may [Congress] by reason of this special power, assume a general jurisdiction and prescribe for the punishment of all offences? If this may be done under the power to regulate commerce with the Indian tribes, why may it not be done in all other cases, where a limited power is exercised by congress to effectuate a special object? Congress have [sic] power to regulate commerce among the several states; and if the same power, given in the same words, in relation to the Indians, may be exercised as contended, why may not congress legislate on crimes for the states generally? . . . If this be a constitutional provision, the jurisdiction by congress for the

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Two provided that federal jurisdiction did not extend to erimes "by one Indian against another, within any Indian Boundary." *Id.* *See* Clinton, *supra* note 249, at 959 (discussing the provisions of the Act). An 1854 criminal statute withdrew federal jurisdiction over crimes by Indians against whites who had been punished by the tribe. COHEN, *supra* note 131, at 126.

251. United States v. Bailey, 24 F. Cas. 937 (C.C.D. Tenn. 1834) (No. 14,495).

252. *Id.* at 938 ("That the federal government is one of limited powers, is a principle so obvious as not to admit of controversy . . . . [T]he federal government ean exercise no powers beyond those which are expressly delegated to it.").

253. *Id.* at 940 (rejecting the proposition that "congress may exercise the same general and exclusive jurisdiction over the Cherokee country [in Tennessee] as over a territory of the United States"); *see also id.* at 939 (arguing that the power of Congress over Indian territory within a state cannot extend beyond the regulation of commerce).

254. *Id.* at 940.

255. *See infra* Part IV(C–D) (discussing antebellum efforts to isolate federal power over commerce and immigration from state powers over slavery).

> punishment of offences in the Indian country, within the boundaries of any state, is without limit.[256]

Finally, Justice McLean rejected the government's claim that necessity justified its jurisdiction:

> It is argued that unless the defendant can be tried under the act of congress, there is no law by which he can be punished. If on this ground the federal government may exercise jurisdiction, where shall its powers be limited? The constitution is no longer the guide, when the government acts from the law of necessity . . . . If the state has no jurisdiction, or has failed to exercise it, it does not follow that the federal government has a general and unlimited jurisdiction over the territory; for its powers are delegated, and cannot be assumed to supply any defect of power on the part of the state.[257]

The Commerce Clause eventually would be used to uphold a range of legislation relating to the Indians, including early non-intercourse laws barring whites from interacting with Indians and purchasing Indian lands, and later restrictions on liquor sales to Indians.[258] But according to Justice McLean, the commerce power did not support enactment of a general criminal code over the Indians. A similar question would soon be considered by the Supreme Court in *United States v. Rogers.*

1. United States v. Rogers.—In 1834, Congress revised U.S. criminal jurisdiction over the Indians, due in part to concerns over the 1817 Act's legality.[259] The 1834 Act, which Congress adopted under the Indian Commerce and Territory Clauses,[260] recognized U.S. criminal jurisdiction over all crimes committed in Indian country except "crimes committed by one Indian against the person or property of another Indian."[261] The provision was consistent with numerous treaty requirements that offenders in crimes between Indians and non-Indians be relinquished to the United States.[262]

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256. *Bailey*, 24 F. Cas. at 938, 940.

257. *Id.* at 939. Because the crime involved whites and occurred within a state, McLean left open the possibility that the state might have jurisdiction over the crime.

258. United States v. Holliday, 70 U.S. (3 Wall.) 407, 416–18 (1865) (finding that Congress has the power under the Indian Commerce Clause to regulate liquor sales to Indians within a state); *accord* United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 195 (1876) (agreeing with *Holliday*).

259. The House Report read the 1817 Act as extending federal criminal laws "to *all persons* in the Indian country, without exception," and stated, "[I]t is not perceived that we ean with any justice or propriety extend our laws to offences committed by Indians against Indians, *at any place* within their own limits." H.R. REP. NO. 23-474, at 13 (1834).

260. *Id.* at 10 (invoking "[t]he constitutional power 'to regulate commerce with the Indian tribes,' and 'to make all needful rules and regulations respecting the territory of the United States'").

261. Act of June 30, 1834, § 25, 4 Stat. 729, 733 (1834).

262. *See* COHEN, *supra* note 131, at 60–61 nn.85–87.

In 1845, William Rogers, a white man who had lived with the Cherokee Nation for a decade and was recognized as a member by the tribe, was indicted under the 1834 Act in the federal district court of Arkansas for murdering another Cherokee.[263] The crime had occurred in Indian country, on lands over which the tribe possessed nearly exclusive internal jurisdiction by treaty.[264] Rogers objected to federal jurisdiction on the grounds that both he and the victim were citizens of the Cherokee Nation.[265] The U.S. district attorney argued in opposition that a U.S. citizen could neither relinquish his citizenship nor become a citizen of an Indian tribe without federal authorization.[266] Rogers drowned in an attempt to escape from prison before the Supreme Court heard his case, but the Court did not learn of his death and considered the case without anyone appearing on Rogers's behalf.[267]

Rogers involved an issue of statutory and treaty interpretation; no issue was presented regarding Congress's underlying authority to legislate over the tribes.[268] Nevertheless, Chief Justice Taney opened his opinion for the Court by asserting that Congress exercised authority over the Indian tribes as a result of discovery, which placed Indian lands under U.S. control:

> The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, . . . and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.[269]

Chief Justice Taney thus revived the extreme version of the discovery doctrine elaborated in *M'Intosh*.[270] Taney offered no support for his position, which echoed Johnson's and Baldwin's concurrences in *Cherokee Nation* and patently contradicted *Worcester*. Indeed, the passage would also be

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263. United States v. Rogers, 45 U.S. (4 How.) 567, 570–71 (1846).

264. *See* The Treaty of New Echota, art. 5 (1835), *cited in Rogers*, 45 U.S. at 573 (securing to the tribe the right of internal governance, so long as its laws were consistent with the Constitution).

265. *Rogers*, 45 U.S. at 571.

266. *Id.* at 569 (argument for petitioner).

267. WILKINS, AMERICAN INDIAN SOVEREIGNTY, *supra* note 52, at 40.

268. Record at 4–7, *Rogers* (No. 114).

269. *Rogers*, 45 U.S. at 571–72.

270. *See supra* text accompanying notes 175–81.

contradicted by Chief Justice Taney's later portrayal of Indian tribes in *Dred Scott* as "a free and independent people" who had "always been treated as foreigners not living under our Government" and who enjoyed the right to occupy their lands "as long as [the Indians] thought proper."[271]

The fact that Rogers's crime occurred in Cherokee territory was irrelevant. Chief Justice Taney carved out a much broader authority for the United States over Indians in the territories than Congress had ever claimed:

> [W]e think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the states, *Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.*[272]

In short, discovery, and the resulting presence of the tribe within U.S. boundaries, gave Congress plenary authority to legislate a criminal code for the Indians. Rogers's putative status as an Indian was accordingly irrelevant.

Where did this power to regulate intra-tribal conduct come from? Taney's opinion did not mention the Constitution or make any effort to tie federal power over the tribes to the treaty power, the Commerce Clause, or any other enumerated constitutional power. Although some commentators have interpreted *Rogers* as relying on the Article IV Territory Clause, the Chief Justice did not invoke the provision.[273] His sole justification for the power was the extraconstitutional, inherent power arising from discovery, the Indians' resulting presence within U.S. borders, and the Indians' status as an "unfortunate race."[274] For Taney, the putative strict constructionist who would hold that Congress lacked authority to outlaw slavery in *Dred Scott* and who denied the existence of inherent wartime powers in *Ex parte Merryman*,[275] the claim of congressional power here was breathtaking.

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271. Scott v. Sandford, 60 U.S. (19 How.) 393, 403–04 (1857). Chief Justice Taney asserted that

> neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it.... Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government.

Id. at 404.

272. *Rogers*, 45 U.S. at 572 (emphasis added).

273. Newton, *supra* note 52, at 210 & n.73. It is unclear whether, at this point, Taney was of the opinion that he asserted in *Dred Scott* that the Territory Clause only applied to the original territories of the United States. *See Dred Scott*, 60 U.S. at 432.

274. *Rogers*, 45 U.S. at 571.

275. In his *Merryman* opinion, Taney claimed:

> Nor can any argument [that the President may suspend habeas corpus] be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger. The government of the United States is one of delegated and

Chief Justice Taney then introduced a second cornerstone of the inherent powers doctrine—a presumption against judicial review. Taney noted that the United States presumably "exercised its power over" the tribes "in the spirit of humanity and justice,"[276] but that such benevolence was not required. Even if Congress's actions were not in the interests of the tribe, he reasoned, those actions were "a question for the law-making and political department, and not for the judicial . . . ."[277]

Thus Chief Justice Taney offered a near-complete statement of the inherent powers doctrine. Congress enjoyed inherent power, whose source lay in the Indians' presence within U.S. borders and the international law doctrines of colonial prerogative and aboriginal status, which treated Indian lands as "vacant." Moreover, the question of U.S. authority *vis-a-vis* the Indians was political and not a proper subject for judicial inquiry.

Rogers signaled the introduction, not the triumph, of the inherent powers doctrine over Indian tribes. Most of the discussion was dicta, and later decisions of the Taney Court reasserted the Indian sovereignty vision of federal-tribal relations.[278] Nevertheless, national political forces seeking to extend U.S. criminal jurisdiction to all crimes in Indian country quickly embraced the decision. In April 1846, President Polk proposed the extension of federal jurisdiction to all Indians guilty of murder and similar felonies.[279] A few months later, a Senate Report observed that the Supreme Court had "conclusive[ly]" established that the United States had "*original power* . . . to subject the Indian tribes within the limits of their sovereignty to any system of laws having for their object the prevention or punishment of crime[s]."[280] Legislation was introduced in Congress that would have accomplished this goal, but was successfully opposed, for the time being, by the Cherokee and others.[281]

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limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches . . . can exercise any of the powers of government beyond those specified and granted . . . .

Ex Parte Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487).

276. *Rogers*, 45 U.S. at 571.

277. *Id.* at 572.

278. *Dred Scott*, 60 U.S. at 403–04; *cf.* Parks v. Ross, 52 U.S. (11 How.) 362, 374 (1850) ("The Cherokees are in many respects a foreign and independent nation. They are governed by their own laws and officers, chosen by themselves. And though in a state of pupilage, and under the guardianship of the United States, this government has delegated no power to the courts of this District to arrest the public representatives or agents of Indian Nations . . . .").

279. CONG. GLOBE, 29th Cong., 1st Sess. 666 (1846), *quoted in* WILKINS, AMERICAN INDIAN SOVEREIGNTY, *supra* note 52, at 37.

280. S. REP. NO. 29-461, at 2 (1846) (citing *Rogers*, 45 U.S. at 572).

281. CONG. GLOBE, 29th Cong., 1st Sess. 1147 (1846). *See also* WILKINS, AMERICAN INDIAN SOVEREIGNTY, *supra* note 52, at 37–38 (discussing Cherokee Principal Chief Ross's successful appeal to the Senate not to extend U.S. criminal laws over Indian land).

D. The End of the Treaty Era

Respect for Indian sovereignty, and the corresponding recognition of limited national power, continued to dominate policy over the Indians in the Civil War and early Reconstruction period. Congress continued to view Indians as distinct nations with whom the United States dealt through treaties, and no major statutory or treaty constraints were imposed on tribes prior to the mid-1800s.[282] Membership theories were used at this point to limit both the Indians' ability to become citizens and the United States' ability to assert jurisdiction over them. The debates over the Civil Rights Act of 1866[283] and the Fourteenth Amendment[284] portrayed Indians as excluded from U.S. citizenship based on the tribes' status as separate, self-governing sovereigns and non-members in the U.S. polity. During the debates, Senator Trumbull advocated the exclusion of "Indians not taxed" from the Civil Rights Act's citizenship provisions:

> Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens.[285]

A Senate Judiciary Committee report on the impact of the Fourteenth Amendment on Indian tribes likewise concluded that Indians who retained tribal status were not subject to U.S. jurisdiction within the meaning of the Amendment's citizenship provisions.[286] A review of U.S. treaties, statutes, and judicial decisions, the report observed, established "that Congress has never regarded the Indian tribes as subject to the municipal jurisdiction of the United States."[287] The United States had asserted only such jurisdiction over Indians as it asserted over the alien members of any other sovereign foreign state, and "[t]heir right of self-government, and to administer justice among themselves . . . ha[d] never been questioned."[288]

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282. PRUCHA, *supra* note 130, at 211; *see also* COHEN, *supra* note 131, at 68 ("From 1776 to 1849, all treaty limitations upon the powers of tribal self-government were related in some way to intercourse with non-Indians."); Clinton, *supra* note 249, at 957 ("The later treaties continued . . . earlier patterns by indicating that the tribes had complete sovereignty and jurisdiction over intratribal crimes occurring on the reservations.").

283. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (providing "[t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States").

284. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

285. CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866).

286. S. REP. NO. 41-268 (1870).

287. *Id.* at 9.

288. *Id.* at 10. In his edition of Story's *Commentaries*, Judge Cooley agreed, finding that "it would be obviously inconsistent with the semi-independent character of such a tribe, and with the

Respect for tribal sovereignty in U.S.-Indian relations was eroding, however. During the 1850s and 1860s, the United States substantially increased federal power over Indian affairs through the exercise of the treaty power. Some treaty provisions provided that "[the Indians] will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct."[289] During the Civil War, Congress gave the President authority to abrogate U.S. treaties with tribes who allied with the Confederacy[290]—an authority that presumably was based on the war powers. In the war's aftermath, tribes that had supported the Confederacy were required to accept treaties relinquishing many promises previously made to them by the federal government.[291] Wars with the Sioux and other Plains Indian tribes resulted in a series of peace treaties in 1867 and 1868 which authorized increased federal intervention.[292] Many of the treaties of this period were obtaincd through fraud or duress, or negotiated with minority factions of the tribes, and some were never ratified.[293]

Fcderal support for treaty relations with the Indians was also eroding during this period. Resort to the treaty power was based on the recognition of Indians as autonomous sovereigns, and federal removal policies, wars, broken treaties, and increasing federal intrusion on internal Indian affairs undermined this status. Thus, in 1862, Secretary of the Interior Caleb Smith argued that Indians should not be considered "quasi-independent nations" becausc "they have none of the elements of nationality; they are within the limits of the recognized authority of the United States and must be subject to its control."[294] The Reconstruction period was also an era of weak Presidents and congressional ascendancy. Congress felt less obligated to engage in treaty relations as Indian autonomy eroded, and the House of Representatives was jealous of the treaty-making power bestowed on the Senate and President.[295]

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obedience they are expected to render to their tribal head, that they should be vcsted with the complete rights—or, on the other hand, subjected to the full responsibilities—of American citizens." 2 JOSEPH STORY, CONSTITUTIONAL COMMENTARIES § 1933 at 654 (Thomas M. Cooley ed., Littlc, Brown, and Co. 1873) (1833).

289. Treaty with the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707, 709. Other provisions gave the President broad discretion to adopt "[r]ules and regulations to protect the rights of persons and property among the Indians," to allot tribal lands to individual Indians, or, in the most extreme cases, to provide that the tribe be dissolved and the lands ceded to the United States. COHEN, *supra* note 131, at 69, 98–103.

290. Appropriations Act of July 5, 1862, ch. 135, § 1, 12 Stat. 512, 528 (codified at 25 U.S.C. § 72).

291. COHEN, *supra* note 131, at 104.

292. *Id.* at 104 n.353. These included the Medicine Lodge Treaty of 1867 that was at issue in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

293. COHEN, *supra* note 131, at 63.

294. H.R. EXEC. DOC. NO. 37-1, 10–13 (1862).

295. George William Rice, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239, 239–40 & n.24 (1977). In

Thus, in 1871, Congress abolished the practice of treatying with Indian tribes and provided that henceforth all relations between the United States and the Indians would be conducted through simple legislation.[296] The 1871 statute essentially stripped the Indians of any future treatying capacity, providing that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[297] Congress thus asserted a unilateral authority to legislate over Indian affairs.[298]

Some commentators have suggested that this change was of little significance because the national government continued to seek tribal consent for many congressional actions.[299] The abandonment of treaty-making, however, terminated the primary basis for the recognition of tribal sovereignty and thus of limited U.S. authority.[300] As noted above, just one year before the 1871 Act, a Senate Report examining the impact of the Fourteenth Amendment on Indian citizenship relied heavily on the treatying capacity of Indians to conclude that tribal members had never been "subject to" U.S. jurisdiction and thus were not made citizens by the Amendment.[301] Indeed, the Report reasoned that "inasmuch as the Constitution treats Indian tribes as belonging to the rank of nations capable of making treaties, . . . an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void."[302]

The abandonment of treaty-making was also extremely significant from a constitutional perspective. Where did Congress's general constitutional

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1867, Congress adopted legislation refusing to appropriate any further funds for Indian treaty-making, but the act was repealed a few months later. *Id.* at 240.

296. Appropriations Act of 1871, ch. 120, § 1, 16 Stat. 544, 566 (1871) (codified at 25 U.S.C. § 71).

297. *Id.* ("*Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."); *see also* Antoine v. Washington, 420 U.S. 194, 201–03 (1975) (discussing the history of the 1871 Act).

298. Congress enforced the provision through the appropriations power by refusing to authorize funds for the negotiation or enforcement of any future Indian treaties. Rice, *supra* note 295, at 240. The Executive branch continued to pursue federal-Indian relations through executive agreements until 1919, when Congress prohibited the practice. Appropriations Act of June 30, 1919, ch. 4, § 27, 41 Stat. 1, 34 (codified at 43 U.S.C. § 150).

299. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 221–22 (1989); Rice, *supra* note 295, at 247 (stating that the 1871 Act "did not destroy or decrease the political status of the Indian nations and did not express a congressional intent that tribal governments were dissolved or weakened"); Wilkins, *supra* note 52, at 349–51.

300. *See, e.g.*, The Kansas Indians, 72 U.S. (5 Wall.) 737, 760 (1866) (noting that the national government's recognition of Indians as a nation capable of making treaties precludes states from regulating them as citizens or exercising jurisdiction over them).

301. S. REP. NO. 41-268 (1870); *see supra* notes 286–88.

302. *Id.* at 9.

authority to *legislate* relations with the Indians come from? The Commerce Clause only allowed regulation of trade with the Indians, and the treaty power was tribe-specific and sporadic; it did not grant Congress authority to legislate beyond the existing treaties.[303] Congress might have relied on the Territory Clause, on the theory (based on the discovery doctrine and the western removal of Indians) that the United States exercised sovereignty over Indian lands.[304] But the decision in *Dred Scott* construed the clause as applying only to the original U.S. territories.[305] The end of treaty-making accordingly suggested that respect for tribal sovereignty had so eroded that Congress believed it enjoyed authority to legislate unilaterally for Indian tribes without either enumerated constitutional authority or tribal consent.

The Court's later decisions in the inherent powers era also viewed the legislation as heralding a significant change in U.S.-Indian relations. As the Supreme Court noted in *Cherokee Nation v. Hitchcock*, the statute "voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of [the] United States by the immediate exercise of its legislative power over them."[306] The Court would later assume that this power had always existed and that the power of Congress to legislate derived from the United States' status as a "sovereign nation," "limited only by its own constitution" and the law of nations.[307] The 1871 statute, in short, supplanted the enumerated powers basis for legislation over the Indians with a theory of federal power.

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303. Furthermore, treaties were not always construed to support broad federal legislative authority. *See Ex Parte* Crow Dog, 109 U.S. 556, 571–72 (1883).

304. George F. Canfield, *The Legal Position of the Indian*, 15 AM. L. REV. 21, 25–26 (1881) (relying on the Territory Clause for authority over Indians). Canfield later became a professor of law at Columbia University.

305. *See infra* notes 1318–28 and accompanying text.

306. Cherokee Nation v. Hitchcock, 187 U.S. 294, 305 (1902); *see also In re* Heff, 197 U.S. 488, 498 (1905) ("From that time on the Indian tribes . . . have been subjected to the direct legislation of Congress . . . ."); Lone Wolf v. Hitchcock, 187 U.S. 553, 566–67 (1903) (citing the discussion of the 1871 Act in *Kagama*); Stephens v. Cherokee Nation, 174 U.S. 445, 483 (1899) (noting that the 1871 Act "definitively expressed" the U.S. policy that Indians were not independent nations with which the U.S. could contract by treaty); New York Indians v. United States, 170 U.S. 1, 33 (1898) (noting that the 1871 Act denied the right of Indian tribes to be recognized as independent nations for treaty-making purposes); Cherokee Nation v. S. Kan. Ry., 135 U.S. 641, 655 (1890) (citing the discussion of the 1871 Act in *Choctaw Nation*); Choctaw Nation v. United States, 119 U.S. 1, 27 (1886) ("[T]he Choctaw Nation [was] . . . subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the [1871 Act] . . . to exert its legislative power."); United States v. Kagama, 118 U.S. 375, 382 (1886) (noting that the 1871 Act constituted "a new departure" in U.S.-tribal relations); Brief for the United States at 10, United States v. Kagama, 118 U.S. 375 (1886) (No. 1246) ("[The 1871 Act] effects a revolution in the policy of the Government respecting Indian affairs."). *Compare* Antoine v. Washington, 420 U.S. 194, 201–03 (1975) (recognizing that the 1871 Act merely changed the method by which the United States entered agreements with the tribes), *with* DeCoteau v. Dist. County Court, 420 U.S. 425, 432 (1975) ("[A]fter 1871, the tribes were no longer regarded as sovereign nations, and the Government began to regulate their affairs through statute . . . .").

307. *Choctaw Nation*, 119 U.S. at 27.

1. The Cherokee Tobacco.—The next major case after *Rogers* to address the power of Congress to regulate Indian affairs was the 1870 case of *The Cherokee Tobacco*.[308] The case presented the question of whether a general federal tax on tobacco and alcohol[309] applied to Cherokee territory, despite a treaty that protected goods sold within the territory from federal taxes.[310] The Court thus had to determine (1) whether Congress could lawfully tax Indian country; and (2) if so, whether Congress had properly abrogated the Cherokee treaty to tax the property at issue.

A fragmented four members of a six-member Court upheld the tax in a brief opinion.[311] Writing for the Court, Justice Swayne found that Congress's power to tax Indian country derived from the tribe's presence within U.S. territorial boundaries.[312] Citing *M'Intosh*, *Cherokee Nation*, and Chief Justice Taney's dicta in *Rogers*, the Court reasoned that the "Indian territory is admitted to compose a part of the United States" and is "subject to their authority"; thus, "Congress may, by law, punish any offence committed there."[313] Like Chief Justice Taney before him, Justice Swayne did not attempt to tie this power to any constitutional source but simply asserted that "[b]oth these propositions are so well settled in our jurisprudence that it would be a waste of time to discuss them or to refer to further authorities in their support."[314]

The case arose in the midst of the congressional debates over ending the use of treaties in federal-Indian relations, and the Court facilitated that development by holding that the tax statute's general language "embrace[d] indisputably the Indian territories"[315] and finding, for the first time, that a federal statute could supersede a prior treaty.[316] This treaty termination principle, which came to be known as the "last in time doctrine," would be important to immigration cases of the late 1800s.[317]

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308. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

309. The Internal Revenue Act of 1868 provided that alcohol and tobacco taxes "shall be . . . construed to extend to such articles produced anywhere within the exterior boundaries of the United States," and thus appeared to tax Indian country *sub silentio*. Act of July 20, 1868, ch. 186, 15 Stat. 125, 167.

310. Article 10 of the 1866 treaty with the Cherokee provided that the Cherokee "shall have the right to sell any products [within the territory] . . . without restraint, [or] paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory." *The Cherokee Tobacco*, 78 U.S. at 618.

311. Justice Bradley dissented in an opinion joined by Justice Davis. *Id.* at 622. Justices Nelson and Field and Chief Justice Chase did not take part in the decision. *Id.* at 624.

312. *Id.* at 619.

313. *Id.* (quotations omitted).

314. *Id.*

315. *Id.* at 620.

316. *Id.* at 621.

317. The last-in-time doctrine was definitively established in the immigration cases of the late 1800s. *See* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 193–94 (1888); The Head Money Cases, 112 U.S. 580, 599 (1884).

Justices Bradley and Davis dissented, asserting that treaty stipulations exempted Indian territory from federal jurisdiction.[318] Even the dissenters, however, assumed that the United States retained power "to make such regulations as it may deem necessary in relation to that territory."[319] The members of the Court disagreed only on the degree of respect to be given treaty promises, not on Congress's underlying power.

The Cherokee Tobacco ratified Chief Justice Taney's characterization of Indian tribes as geographically incorporated into the United States and subject to broad congressional power. The Court further undermined Indian sovereignty by establishing that Congress could legislate over them in abrogation of a preexisting treaty. Where treaties had once served as a primary source of federal legislative authority over the Indians, the Court now established that Congress could legislate, not only in the absence of a treaty, but in *abrogation* of the instruments that had once been considered the source of congressional power. The only justification for this authority offered by the court was the Indians' physical presence within U.S. boundaries. Taken together with the principle that the national government would heneeforth conduct Indian relations through legislation, rather than through treaties, the effect on tribal legal status was devastating. The 1871 Aet purported to preserve existing treaties, but the Court now established that Congress could abrogate those treaties at will.

The Supreme Court again affirmed the *Rogers* vision of U.S. authority over the Indians in the 1877 case of *Beecher v. Wetherby*.[320] Writing for the Court, Justice Field cited *M'Intosh* for the proposition that Indians possessed only rights of "occupancy" in their lands, while "[t]he fee was in the United States."[321] Like Justice Taney in *Rogers*, and as Justice Brown would argue in the *Insular Cases*, Justice Field reasoned that only internal conscience, rather than legal constraint, limited congressional authority in regulating Indian land rights:

> It is to be presumed that . . . the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.[322]

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318. *The Cherokee Tobacco*, 78 U.S. at 622 (Bradley, J., dissenting).

319. *Id.*

320. Beecher v. Wetherby, 95 U.S. 517, 525 (1877). The case involved a title dispute over lands that the United States ceded to a state and subsequently reserved to an Indian tribe. *Id.* at 522–23, 525.

321. *Id.* at 525.

322. *Id. See* Downes v. Bidwell, 182 U.S. 244, 280, 282–83 (1890) (Brown, J.).

Nothing in the opinion suggested any constitutional source of authority for this power or any constraint on its exercise.

The period between 1845 and 1877 saw Congress use territorial jurisdiction as a basis for the exercise of its power. This jurisdiction derived from the discovery doctrine, but had significantly transformed by the 1870s. *Worcester* portrayed the doctrine as giving Indian tribes ultimate possession and control of their lands, with the United States enjoying a limited, exclusive right to purchase with Indian consent.[323] But by the 1870s, the emphasis on Indian consent was disappearing, and the Court suggested that Congress held a unilateral right to terminate Indian occupation.[324] Still, the inherent powers doctrine had not been firmly established. Chief Justice Taney's language in *Rogers* was largely dicta, and the *Cherokee Tobacco* decision had been reached by only four members of the Court.[325]

E. Assimilation and the Inherent Powers Era

The last two decades of the nineteenth century saw an aggressive assertion of U.S. jurisdiction over Indian tribes. Congress's new freedom to legislate over Indian relations brought unprecedented federal intrusion into internal tribal affairs. The Major Crimes Aet of 1885 extended federal criminal jurisdiction over Indian lands for seven serious crimes committed betwccn Indians.[326] The General Allotment Act of 1887 (Dawes Act)[327] abandoned the policy of obtaining consent for the allotment of Indian lands,[328] vastly expanded U.S. allotment policies for Indians other than the Five Civilized Tribes,[329] and extended state civil and criminal jurisdiction over allotted lands.[330] Finally, the Curtis Act of 1898[331] and the Burke Act of 1906[332] dissolved the Five Civilized Tribes and subjected them fully to the laws of the United States.

Rapid western expansion and dcmands by settlers for Indian lands spurred much of this increased intervention. Land hunger combined with fervent assimilationist convictions that Indian tribes must be destroyed and

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323. *See supra* text accompanying notes 232–36.

324. *See, e.g.*, *Beecher*, 95 U.S. at 525 (stating that the Indians held only a right of occupancy which the United States could transfer "whenever they chose").

325. *See supra* note 311 and accompanying text.

326. Seven Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153 (1994)) (allowing federal criminal prosecution of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny).

327. Indian General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (current version at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (1994)).

328. COHEN, *supra* note 131, at 613.

329. *See* Dawes Act § 8 (authorizing the President, *inter alia*, to allot Indian lands).

330. *Id.* § 6.

331. Act for the Protection of the People of the Indian Territory and for Other Purposes, ch. 517, 30 Stat. 495 (1898).

332. Burke Act, ch. 2348, 34 Stat. 182 (1906) (currcnt version at 25 U.S.C. § 349 (1994)).

their members civilized, Christianized, and integrated into the white polity.[333] As the 1889 Annual Report of the Commissioner of Indian Affairs put it, "tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted."[334] Congress created courts of Indian offenses in 1883 as "educational and disciplinary instrumentalities . . . to improve and elevate the condition" of Indian tribes.[335] In short, assimilation sought "extermination of the Indian as an Indian."[336] The assimilation of Indians included instilling them with values of private property, and replacing nomadic lifestyles with agrarian lifestyles, practices which, it was believed, would also open up Indian lands. Assimilation, allotment, and civilization went hand in hand.[337]

The 1887 Dawes Act introduced the policy of Indian allotments on a massive scale. Tribal lands were to be dissolved, with specific acreage given to each tribal member, and the remaining lands transferred to the United States, surveyed and opened for white settlement.[338] Indians who had already "adopted the habits of civilized life" separate from a tribe or who accepted allotments were granted U.S. citizenship[339] and barred from alienation for twenty-five years.[340] The remaining approximately eighty million acres of Indian lands were opened to white settlement, with funds from the sales placed in trust for the tribes' education and civilization.[341] The Dawes Act and its progeny became, as President Theodore Roosevelt observed approvingly in 1901, "a mighty pulverizing engine to break up the tribal mass."[342] In the period from 1881 to 1900, Indian lands were reduced by half, from approximately 156 million acres to 78 million.[343] During the same period, courts upheld the legalized expulsion of Indians and the stripping of Indian sovereignty through the inherent powers doctrine.[344]

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333. COHEN, *supra* note 131, at 131–32.

334. COMMISSIONER OF INDIAN AFFAIRS ANNUAL REPORT, H.R. EXEC. DOC., 51-1, at 3–4 (1889).

335. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

336. SMITH, *supra* note 95, at 392 (quoting Indian Commissioner William Jones).

337. *See* FREDERICK HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 42–81 (1984).

338. *See* COHEN, *supra* note 131, at 130–31, 613–14 (discussing the Dawes Act).

339. Indian General Allotment (Dawes) Act of 1887 § 6, 24 Stat. 388 (current version at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (1994)).

340. *Id.* § 6. Indian allotments were held in trust by the United States and barred from alienation for 25 years. The trust status was intended to remedy the pereeived flaw in prior allotment policies, which had granted lands to individual Indians in fee simple with uniformly disastrous results. Allotted lands were quickly alienated to white traders and land speculators, often under fraudulent circumstances, and the failure of the policy had been attributed to the alienability of the allotments. COHEN, *supra* note 131, at 130.

341. Dawes Act § 5. COHEN, *supra* note 131, at 131.

342. Theodore Roosevelt's First Annual Message (Dec. 3, 1901), *in* 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 2047 (Fred L. Israel ed., 1966).

343. SMITH, *supra* note 95, at 393.

344. *See infra* Part III(F).

Indian allotment and assimilation reflected the increasing exercise of authoritarian congressional power over the tribes. But assimilation also raised new problems regarding membership of Indians in the constitutional polity. The breakup of the tribes at least implied that Indians were to become part of American society. Did it also make them citizens, entitled to the full constitutional protections enjoyed by citizens? However eager the country was to obtain Indian land, it was equally reluctant about the implications of Indian membership in the American polity. This tension led some commentators, such as George Canfield, to view the Indians' separate, inferior status as critical to maintaining absolute federal authority over them. In his 1881 article, *The Legal Position of the Indian*, Canfield stressed the Indians' status "as an inferior people, strangers to our laws, our customs, and our privileges."[345] The Constitution had not been drafted to include the Indians and offered them no protection:

> It was for [we the people] that Congress was to legislate, and for such men its power to legislate was to be restricted. To suppose that the framers of the Constitution intended to secure to the Indians the rights and privileges which they valued as Englishmen is to misconceive the spirit of their age, and to impute to it an expansive benevolence which it did not possess.[346]

Canfield drew upon social contract theories to conclude that the United States enjoyed unlimited power over the Indians *because* of the Indians' separate sovereign status.[347] He warned that extending federal legislation over Indian tribes could eliminate this sovereignty and bring Indians into the constitutional community as citizens:

> We may, . . . by making an Indian a person subject to our laws, *withdraw him from the uncontrolled power of Congress, and place him under the protection of the Constitution.* But are things yet ripe for this change? Are we quite sure that the Indian is yet prepared to be invested with all our rights and privileges guaranteed by the Constitution,—among others, the right of trial by jury and the right to bear arms, and to enjoy one's property without restraint? Surely the Constitution was not made for the Indian, and we may be acting incautiously in now extending its provisions over him.[348]

The question of how Indian assimilation affected their citizenship status soon came to the Court in the case of *Elk v. Wilkins*.

1. Indians as Citizens? Elk v. Wilkins.—The question whether Indians born within the territorial boundaries of the United States could be citizens

345. Canfield, *supra* note 304, at 27.
346. *Id.*
347. *Id.* at 27–29, 35.
348. *Id.* at 36–37 (emphasis added).

by birth under the Fourteenth Amendment had been debated since the Amendment's adoption. In the 1884 case of *Elk v. Wilkins*, the Court finally resolved the question against citizenship for Indians born into tribes.[349]

John Elk was an Indian who renounced his tribal membership, became a resident of Nebraska, and fully submitted himself to the authority of the United States.[350] The State of Nebraska rejected Elk's application to register as a voter on the grounds that he was not a citizen, as required by state law.[351] The case thus came to the Supreme Court on the question whether Elk fell within the Fourteenth Amendment's bestowal of citizenship on "all persons born . . . in the United States and subject to the jurisdiction thereof."[352]

In a seven-to-two decision, the Court construed the Fourteenth Amendment as bestowing citizenship only on persons who were "completely" subject to U.S. jurisdiction *at birth*.[353] Persons born into Indian tribes did not qualify, the Court found, because tribes, while "within the territorial limits of the United States," were "distinct political communities."[354] Ignoring the dicta in *Rogers* and the reasoning of *The Cherokee Tobacco*, the Court emphasized tribal sovereignty and autonomy from U.S. authority.[355] Even the 1871 Act did not alter this independent status, according to the Court, but simply "require[d] the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power."[356] Accordingly, Elk had not been *born* "subject to the jurisdiction of the United States," and thus could not be a citizen.[357] His subsequent renouncement of tribal status was irrelevant to the inquiry.

Social contract and membership theories figured prominently in the Court's analysis. "[N]o one can become a citizen of a nation without its consent," the Court reasoned.[358] The members of Indian tribes, as "Indians not taxed," "form[ed] no part of the people entitled to representation,"[359] "were never deemed citizens,"[360] and "were not part of the people of the United States."[361] The opinion made clear that determinations of membership would be left to the discretion of the American polity and declined to

349. Elk v. Wilkins, 112 U.S. 94, 109 (1884).

350. *Id.* at 98.

351. *Id.* at 96 (statement of the case).

352. U.S. CONST. amend. XIV, § 1, cl. 1; *Elk*, 112 U.S. at 99.

353. *Elk*, 112 U.S. at 102.

354. *Id.* at 99; *see also id.* at 102 ("Indians born within the territorial limits of the United States . . . are no more 'born in the United States and subject to the jurisdiction thereof' . . . than the children of subjects of any foreign government . . . .").

355. *Id.* at 99.

356. *Id.* at 107.

357. *Id.* at 109.

358. *Id.* at 103.

359. *Id.*

360. *Id.* at 100.

361. *Id.* at 99.

find that the Fourteenth Amendment constituted their consent. The resulting status of Indians as entirely subject to U.S. authority, but excluded from the benefits of citizenship, would later be used in the *Insular Cases* to justify the non-citizen status of U.S. territorial inhabitants.[362]

Justice Harlan dissented together with Justice Woods, and concluded that Indians who renounced tribal membership became subject to U.S. jurisdiction and thus fell within the Amendment's scope.[363] Harlan noted that Elk was subject to taxation in Nebraska, was a part of the state militia, was counted for purposes of apportionment, and could sue and be sued in Nebraska courts.[364] Justice Harlan also noted that *Cherokee Nation*, *Rogers*, and *The Cherokee* Tobacco had all held that the tribes were subject to U.S. authority.[365] Like Justice Thompson in *Cherokee Nation*,[366] Justice Harlan rejected the notion that the Constitution tolerated a population that was neither citizen nor alien. If the majority's interpretation was correct, Harlan concluded,

> then the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.[367]

The *Elk* majority thus resurrected the principle of Indian sovereignty to justify the exclusion of Indians from the American polity. While prior decisions relied on the Indians' increasing subjugation to justify the exercise of ever-broader national authority, *Elk* invoked tribal *independence* to withhold the benefits of citizenship from Indians. Ironically, Indian tribes' exclusion from the national polity and resulting lack of citizenship, as George Canfield argued, *also* left them subject to the plenary power of the United States.

2. United States v. Kagama.—The Court soon made apparent just how subject to U.S. jurisdiction the Indians actually were in the 1886 case of

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362. *See infra* Part IV(G).

363. *Elk*, 112 U.S. at 114–15 (Harlan, J., dissenting).

364. *Id.* at 111 (Harlan, J., dissenting).

365. *Id.* at 121–22 (Harlan, J., dissenting). Harlan's position was thus more faithful to the Court's Indian law holdings, and to the longstanding view that Indians who were not tribal members and were taxed were fully subject to U.S. jurisdiction, though his position that Elk could acquire citizenship after birth by renouncing his tribal membership contradicted the Fourteenth Amendment's background in the common-law tradition that citizenship attached at birth.

366. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 66 (1831).

367. *Elk*, 112 U.S. at 122–23 (Harlan, J., dissenting).

United States v. Kagama,[368] which ushered in the inherent powers era. Kagama involved a constitutional challenge to the 1885 Major Crimes Act, which had finally extended complete U.S. criminal jurisdiction to seven major crimes between Indians.[369] The Major Crimes Act, which had been adopted in reaction to the Court's decision in *Crow Dog*,[370] reflected two major innovations in the exercise of federal authority. The Act both regulated crimes between Indians in Indian country[371] and extended federal jurisdiction to crimes committed between Indians on reservations within the states.[372]

Kagama involved the prosecution of an Indian for murdering another Indian on a reservation in California.[373] *Kagama* thus finally presented the Supreme Court with the question of Congress's constitutional authority to legislate a criminal code for Indian tribes.

Interestingly, neither the United States nor Kagama contended that Congress's power derived from the doctrine of discovery, the Indians' presence in U.S. territory, or any other inherent power. Both parties instead relied exclusively on enumerated powers arguments and focused on whether the Major Crimes Act could be upheld nnder the Indian Commerce Clause. In its briefs to the Court, the United States argued that the commerce power gave the federal government plcnary power to regulate Indian affairs.[374] The Commerce Clause, the government maintained, had always authorized the United States to legislate "intercourse" with the Indians, broadly defined,[375] and the power to regulate crimes was incidental to that power.[376] The Major Crimes Act related to commerce, the government argued, because "[i]f [the Indians] are permitted to murder each other, it is certainly an interference

368. 118 U.S. 375 (1886).

369. *See* Seven Crimes Act, 23 Stat. 362 (1885) (current version at 18 U.S.C. § 1153 (2000)). Congress adopted the Act in direct response to the Court's decision in *Ex parte Crow Dog*, 109 U.S. 556, 567 (1883), which concluded that existing federal law, as drafted, did not authorize the United Statcs to prosecute a murder committed between two Indians. Clinton, *supra* note 249, at 963–64; COHEN, *supra* note 131, at 300.

370. In *Ex parte Crow Dog*, the Court held that a federal criminal statute did not apply to Indian crimes committed in Sioux territory despite an 1877 agreement subjecting the Indians to thc laws of the Unitcd States. *Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883). In a late affirmation of Indian sovercignty, the Court concluded that other language was intended to secure to thc tribc thc right to "self-government, [and] the regulation by themselvcs of their own domestic affairs." *Id.* at 569.

371. *Kagama*, 118 U.S. at 377.

372. *Id.* at 377–78.

373. *Id.* at 375.

374. Brief for the United States at 14, United States v. Kagama, 118 U.S. 375 (1886) (No. 1246) ("[T]here is no limitation upon the power of Congress to enact whatever laws may bc necessary to regulate the affairs of the Indian tribes . . . .").

375. *Id.* at 5–6.

376. *Id.* at 22–23 (arguing that "the powcr of punishmcnt appertains to sovercignty, and may be exercised whcnever the sovereigu has a right to act, as incidental to his constitutional powers" under the Commerce Clause).

with intercourse; because the number with whom intercourse will be held is thereby diminished."[377] While the United States previously had declined to regulate crimes between Indians, the Indians' shrinking numbers and growing dependence had materially changed the U.S.-Indian relationship and justified the present law.[378] The United States maintained that *United States v. Rogers* established that Congress possessed the criminal authority now being exercised.[379] And although the government attempted to tie the criminal statute at issue to commerce, the government portrayed federal power as reaching all aspects of Indian affairs, unconstrained by the Constitution. The United States, counsel maintained, "can take from [Indians] their reservations; it can move them to another Territory; it can, if it chooses, impose upon them its municipal laws; it has not in many relations chosen to do so, but *its power nevertheless remains and is unchecked by any Constitutional restraint.*"[380] Moreover, the question was "purely [onc] of policy,"[381] "a question of legislative discretion, and not of judicial cognizance."[382]

The defendant, on the other hand, denied that the Commerce Clause gave Congress the power to draft a criminal code for Indians. Citing *United States v. Bailey*, Kagama argued from enumerated powcrs principles that the federal government was one of limited, delegated powers.[383] If the Commerce Clause authorized such general federal power over *Indians* within the states, Kagama argued, "why may not Congress legislate on crimes for the States generally?"[384]

A unanimous Court upheld the constitutionality of the Major Crimes Act. Writing for the Court, Justice Miller began his analysis by eliminating the possible enumerated bases for the federal power. The Constitution, he noted, was "almost silent" with regard to relations between the federal government and the Indians.[385] Neither of the textual references to "Indians not taxed" justified Congress's regulation of internal Indian affairs.[386] Justice Miller then rejected the government's reliance on the Indian Commerce Clause, finding that "we think it would be a very strained construction . . . that a system of criminal laws for Indians living peaceably in their reservations . . . was authorized by the grant of power to regulate commercc

377. *Id.* at 24.

378. *Id.* at 19.

379. *Id.* at 27.

380. *Id.* at 27–28 (citation omitted) (emphasis added).

381. *Id.* at 27.

382. *Id.* at 20.

383. Brief for Defendant at 11, *Kagama* (No. 1246) (citing Unitcd States v. Bailey, 24 F. Cas. 937 (C.C.D. Tenn. 1834) (No. 14,495)).

384. *Id.* at 12 (quoting *Bailey*, 24 F. Cas. at 940).

385. *Kagama*, 118 U.S. at 378.

386. *Id.*

with the Indian tribes."[387] Instead, Miller asserted that Congress had inherent sovereign power to govern the territories.

Miller first established that Indians were present within the boundaries of the United States and thus necessarily subject to either state or federal power:

> [T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.[388]

Miller's framework thus recognized only two sovereignties in the constitutional structure: the national and state governments. All other authorities were the creation of, and ultimately subject to, the control of these powers.[389] Invoking the territory cases of *Murphy v. Ramsey*[390] and *American Insurance Co. v. Canter*,[391] Miller linked the question to Congress's inherent power to govern the territories:

> [T]his power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the [territory] clause in the constitution . . . as from the ownership of the country in which the territories are, and *the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.*"[392]

Quoting at length from Chief Justice Taney's sweeping dicta in *Rogers*, Miller reasoned that federal authority over the Indians derived from discovery,[393] and that as a result, "Congress may by law punish any offence committed there."[394]

Kagama involved the power of Congress to criminalize Indian-on-Indian conduct within the *states*, not the territories. But Miller concluded that Congress's power over Indians in the territories "must in a large degree" resolve Congress's power within the states.[395] This, too, was "within the competency of Congress," due to Congress's guardianship role in protecting its Indian wards from hostile states.[396] "From their very weakness and

387. *Id.* at 378–79.
388. *Id.* at 379.
389. *Id.*
390. 114 U.S. 44 (1885); *see also infra* notes 1350–55 and accompanying text.
391. 6 U.S. (1 Pet.) 516, 542 (1828); *see also infra* notes 1237–59 and accompanying text.
392. *Kagama*, 118 U.S. at 380 (emphasis added).
393. *Id.* at 380–81.
394. *Id.*
395. *Id.* at 378.
396. *Id.* at 383.

helplessness . . .," Miller reasoned, "there arises the duty of protection, and with it the power."[397]

Miller closed with a sweeping assertion of inherent federal power, driven by necessity:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. *It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because [the United States] alone can enforce its laws on all the tribes.*[398]

Kagama definitively established the first prong of the inherent powers doctrine: an inherent *source* of federal power over the Indian tribes. The most remarkable aspect of Justice Miller's analysis was the complete absence of any reliance on the Constitution as the basis for national authority. Although the question presented in the case was whether the Major Crimes Act was "a constitutional and valid law of the United States," Miller made no attempt to tie the power to any constitutional provision. The justifications derived from the doctrines of discovery, inherent sovereign authority over U.S. territories, Indian dependence, and a strong assertion of raw national power. Despite the extraordinary departure from the enumerated powers doctrine, no member of the Court dissented.

The other two prongs of the inherent powers doctrine remained unresolved. It is unclear whether the Court viewed the power it upheld in *Kagama* as limited by other provisions of the Constitution, since that case did not allege any violation of individual constitutional rights. Could the United States, for example, have tried Kagama without a grand and petit jury? It is also unclear whether the Court believed that judicial review of federal actions over Indians was appropriate. Justice Miller quoted in passing Chief Justice Taney's assertion that the exercise was "a question for the law-making and political department of the government, and not for the judicial,"[399] but did not elaborate. It would be left to later cases to flesh out these latter two prongs of the inherent powers doctrine.

Kagama ushered in the high plenary power era of U.S. Indian law, and the inherent powers approach quickly infiltrated the Court's analysis even in straight Commerce Clause cases. In the 1890 case of *Cherokee Nation v. Southern Kansas Railway Co.*,[400] the Court upheld the national government's power under the Indian Commerce Clause to condemn tribal lands for a

397. *Id.* at 384.

398. *Id.* at 384–85 (emphasis added).

399. *Id.* at 380–81 (citing U.S. v. Rogers, 45 U.S. (4 How.) 567, 572 (1846)).

400. 135 U.S. 641 (1890).

railroad right-of-way, finding that the railroad had a "direct relation to commerce with the Indian tribes, as well as with commerce among the states."[401] Writing for the Court, Justice Harlan rejected the Cherokee Tribe's claim that it was a sovereign possessing the exclusive power of eminent domain over its lands, quoting from *Kagama*, *Rogers*, and *Cherokee Nation v. Georgia* at length to emphasize the Indians' dependent, ward-like status, their presence within U.S. borders, and Congress's inherent power.[402]

F. The End of Sovereignty for the Civilized Tribes

In the 1890s, preserving American principles of democratic self-governance became the justification for the final extension of plenary federal authority over the Five Civilized Tribes. These tribes, including the Cherokee Nation, had been exempted from the allotment provisions of the Dawes Act[403] and retained a degree of tribal autonomy. An 1894 Senate Report by the Dawes Commission,[404] however, concluded that the Civilized Tribes had failed to properly manage tribal lands, that the government of the tribes was "non-American" and "radically wrong," and that congressional intervention in this "deplorable state of affairs" was imperative.[405] The report invoked the United States' "constitutional obligation[]" "to see to it that government everywhere within its jurisdiction rests on the consent of the governed."[406] Applying a logic that would be central to U.S. acquisition of the Insular territories, the Commission urged that the depraved and undemocratic nature of tribal governance left "no alternative" to the United States but to assume responsibility for the territory.[407] Any treaties securing lands to the tribes also did not qualify Congress's original, inherent authority: "Whatever power congress possessed over the Indians as semi-dependent nations, or as persons within its jurisdiction, it still possesses, notwithstanding [that] several treaties may have stipulated that the Government would not exercise such power."[408]

Congress responded to the report with a series of statutes dissolving the legal authority of the Five Civilized Tribes, allotting their lands, and

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401. *Id.* at 657. Similar legislation had been debated for years but rejected as an unauthorized intrusion on tribal powers. In 1886, for example, President Cleveland had vetoed legislation that would have granted a railroad right-of-way through reservation lands in Montana without tribal consent. *See* WILKINS, AMERICAN INDIAN SOVEREIGNTY, *supra* note 52, at 81–82.

402. Cherokee Nation v. S. Kan. Ry., 135 U.S. at 653–55.

403. Indian General Allotment (Dawes) Act of 1887, §§ 1, 5, 6, 8, 24 Stat. 388 (current version at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (1994)).

404. S. REP. NO. 53-377, at 12 (1894), *quoted in* Stephens v. Cherokee Nation, 174 U.S. 445 (1899).

405. *Stephens*, 174 U.S. at 451.

406. *Id.*

407. *Id.* at 452–53.

408. *Id.* at 450.

subjecting the entire Indian territory to complete U.S. authority. Responding to assimilationist impulses, in 1901 Congress bestowed citizenship on inhabitants of the Indian territory.[409] By 1906, however, Congress apparently concluded that Indian citizenship was premature. That year, Congress severely restricted the ability of the tribal legislatures to meet, subjected their actions to presidential veto,[410] and delayed citizenship for Indians until the end of the twenty-five-year Dawes Act trust period.[411] In 1907, Congress authorized the Indian Commissioner to sell allotments held by Indians deemed "noncompetent" to work them.[412]

Three significant inherent powers cases decided between 1899 and 1903 addressed the dismantling of the Five Civilized Tribes.[413] *Stephens v. Cherokee Nation* involved a challenge by the Cherokee, Choctaw, Chickasaw, and Creek nations to the constitutionality of the Indian Appropriations Acts of 1896[414] and 1897,[415] which authorized the Dawes Commission to determine the citizenship of the Five Civilized Tribes. The tribes also challenged the Curtis Act of 1898, which abolished the tribal laws and courts of the Five Civilized Tribes, provided for the allotment of tribal lands, and subjected the tribes to the complete jurisdiction of the United States.[416] The tribes contended that both provisions exceeded Congress's constitutional authority and violated various treatics with the tribes.[417]

Writing for the Court, Chief Justice Fuller opened the opinion by assuming that Congress possessed "plenary power of legislation [over Indian tribes], subject only to the Constitution of the United States."[418] Fuller spent little time examining the particular statutory provisions at issue and did not identify any enumerated constitutional basis for the legislation. Instead, he asserted an inherent powers argument based on the Indians' dependence on the federal government and Congress's "paramount" authority over them.[419]

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409. *See* SMITH, *supra* note 95, at 633–34 n.168. Allotment of the lands of the Five Civilized Tribes in the Oklahoma territory proceeded rapidly, and Oklahoma was admitted to the Union in 1907.

410. Five Tribes Act of 1906, ch. 1876, § 28, 34 Stat. 137, 148.

411. Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 182, 183 (current version at 25 U.S.C. § 349 (1994)).

412. *See* SMITH, *supra* note 95, at 461.

413. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Stephens v. Cherokee Nation, 174 U.S. 445 (1899).

414. Appropriations Act of 1896, ch. 398, 29 Stat. 321, 339 (1896).

415. Appropriations Act of 1897, ch. 3, 30 Stat. 84 (1897).

416. Act of June 28, 1898, ch. 517, §§ 11, 26, 28, 30 Stat. 497 (1898).

417. Treatics with the Cherokee had secured the title and possession of their lands, the right of self-government, and jurisdiction over their country, *Stephens*, 174 U.S. at 485, while another agreement with two tribes had promised to continue tribal govcrnance for a period of eight years. *Id.* at 491.

418. *Id.* at 478.

419. *Id.* at 488 ("[I]n view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we cannot say that

The Chief Justice observed that the present policy toward the tribes was "definitively expressed" in the 1871 Act,[420] which established that Indians were not independent nations with whom the United States must contract by treaty.[421] The opinion quoted at length from Justice Harlan's discussion in *Southern Kansas Railway*[422] of the Indians' dependent and ward-like status without acknowledging that Congress's authority in that decision had derived from the Indian Commerce Clause. *Stephens* now viewed Indian dependence and congressional inherent power alone as sufficient. "Such being the position occupied by these tribes," Fuller reasoned, "and the power of Congress . . . having the plenitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution."[423] Congress had adopted the Curtis Act while the case was pending and that Act's constitutionality thus was not clearly presented.[424] Nevertheless, Chief Justice Fuller also purported to hold the "entire legislation" constitutional.[425] Finally, he concluded that the 1871 renouncement of treaty-making and the last-in-time doctrine rendered useless any treaty rights claimed by the tribes.[426]

The next two major inherent power cases, *Cherokee Nation v. Hitchcock*[427] and *Lone Wolf v. Hitchcock*,[428] proceeded through the courts simultaneously and were decided one month apart. Both presented Fifth Amendment challenges to Congress's efforts to manage or allot Cherokee property *without* tribal consent. *Cherokee Nation* involved a challenge by the Cherokee Nation to section 13 of the Curtis Act,[429] which authorized the United States to lease Cherokee lands for mining, with proceeds to be used for the tribe's benefit.[430]

In its brief to the Court, the tribe asserted that the lease constituted a taking without just compensation under the Fifth Amendment and deprived it of its property rights without due process of law.[431] The tribe's position was

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Congress could not empower the Dawes Commission to determine . . . who were entitled to citizenship in each of the tribes . . . .").

420. *Id.* at 483.

421. *Id.*

422. *Id.* at 484 (quoting Cherokee Nation v. S. Kan. Ry., 135 U.S. 641, 653 (1890)).

423. *Id.* at 486.

424. *Id.* at 488–89.

425. *Id.* at 491–92.

426. *Id.* at 483 ("[I]t is well settled that an act of Congress may supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government." (quotations omitted)).

427. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

428. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

429. Act of June 28, 1898, ch. 517, § 13, 30 Stat. 495, 498 (1898).

430. *Id.* § 16 ("[A]ll royalties and rents hereafter payable to the tribe shall be paid . . . into the Treasury of the United States to the credit of the tribe . . . .").

431. Brief for the Cherokee Nation at 17, Cherokee Nation v. Hitchcoek, 187 U.S. 294 (1902) (No. 340).

strong. The Cherokee Nation uniquely held its lands in fee simple.[432] Furthermore, Congress made members of the tribe citizens of the United States by a 1901 statute,[433] and Congress in 1890 definitively provided that the Constitution was in full force in the Indian Territory of Oklahoma.[434] Whether or not this formal extension was legally required in order for the Constitution to have full effect in Cherokee territory, the tribe noted that the recent decision in the Insular case of *Downes v. Bidwell*[435] definitively established that once Congress extended the Constitution to a territory, "Congress . . . [could not] enact laws inconsistent therewith."[436] The tribe accordingly asserted that its members, as citizens, had been removed from wardship status and were entitled to all the privileges and immunities of citizens.[437] Their property was as unassailable, the tribe argued, "as if they were citizens of Massachusetts and descendants of the Pilgrim fathers."[438] Notably, the tribe did not challenge the constitutional *source* of Congress's authority to legislate but argued in its brief to the Court that its lands were not public lands,[439] and that the treaties and patents transferring title to the tribe barred Congress from authorizing lease of the lands without tribal consent.[440] The tribe otherwise deferred to the arguments of the Indians in *Lone Wolf*, who were represented by the same counsel.[441]

Assistant Attorney General Willis Van Devanter, who later joined the Court, represented the United States in both *Cherokee* and *Lone Wolf*. The government asserted that Congress enjoyed power to lease Indian lands, citing the discussion of Congress's inherent powers from *Kagama*.[442] Indians were wards and dependents, over whom the state enjoyed *parens patriae* authority to legislate on their behalf, as it did for minors and incompetents.[443] This power was "inherent in the supreme power of every state."[444] The United States argued at length that Congress enjoyed "exclusive sovereignty" over the territories, citing the territory cases of *National Bank v. County of*

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432. Treaties and a patent had "forever secured and guaranteed" the lands to the tribe and its heirs. *Id.* at 8.

433. *Id.* at 15 (citing Act of Mar. 3, 1901, 31 Stat. 1447) (bestowing citizenship on Indians in the Oklahoma Indian Territory).

434. *Id.* at 14.

435. 182 U.S. 244 (1901).

436. Brief for the Cherokee Nation at 14, *Cherokee Nation v. Hitchcock* (No. 340).

437. *Id.* at 15.

438. *Id.*

439. *Id.* at 8.

440. *Id.* at 7.

441. *Id.* at 6, 16–17.

442. Brief for the United States, *Cherokee Nation v. Hitchcock* (No. 340).

443. *Id.* at 19.

444. *Id.* at 25 (quoting The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890)).

Yankton,[445] *Murphy v. Ramsey*, and the Insular decisions of *De Lima v. Bidwell* and *Downes v. Bidwell*.[446] The bestowal of citizenship on the Cherokee in no way altered the relationship between the federal government and the tribe. Instead, it strengthened the government's ability to intervene in Indian affairs, because not only did the government have the duty of protecting them as Indians but also had the duty of protecting them as citizens within the exclusive jurisdiction of Congress.[447] Furthermore, the government argued, no taking of property was involved.[448] No individual Indian owned the lands, which were held communally by the tribe, and the leases were for the tribe's benefit.[449] The tribe's title to the lands did not mean that Congress had relinquished its authority over them,[450] the government maintained, and Congress's decisions regarding how to manage the lands for the tribes were questions of "power" not subject to review in the courts.[451]

Writing for the Court in *Cherokee Nation v. Hitchcock*, Justice Edward White upheld the legislation.[452] The Court determined that *Stephens v. Cherokee Nation* reaffirmed that the Indians remained "in a condition of pupilage or dependency, . . . subject to the paramount authority of the United States."[453] "The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate . . . directly for the protection of the tribal property" were sufficient to uphold the authority.[454] The power to make tribal property productive, the Court concluded, was implicit in the *Stephens* decision upholding the power of Congress to determine tribal citizenship for allotment purposes.[455]

Cherokee Nation v. Hitchcock for the first time squarely presented the question of the scope of congressional power in the face of a competing constitutional right. The Court rejected the tribe's Fifth Amendment takings claim, however, finding that Congress's exercise of authority merely involved the "control and development" of tribal property.[456] The Indians' claim of title was of no avail, the Court held, because the title was in the tribe, not individual Indians.[457] "The lands and moneys of these tribes are

445. *Id.* at 17–18 ("[I]t is certainly now too late to doubt the power of Congress to govern the Territories." (citing *Yankton*, 101 U.S. 129, 133 (1880))).

446. *Id.* at 19.

447. *Id.* at 30.

448. *Id.* at 17, 32.

449. *Id.*

450. *Id.* at 37–38.

451. *Id.* at 39–43.

452. 187 U.S. 294, 307–08 (1902).

453. *Id.* at 305 (citing Stephens v. Cherokee Nation, 174 U.S. 445, 484 (1899)).

454. *Id.* at 306.

455. *Id.* at 306–07.

456. *Id.* at 307–08.

457. *Id.* at 307.

public lands and public moneys," subject to the administrative control of the government, *even though* Congress had made the tribe members citizens.[458]

Fully embracing the government's argument, Justice White finally held that the exercise of the power was a political question dedicated to congressional discretion:

> We are not concerned in this case with the question whether the [Curtis Act] . . . is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.[459]

Cherokee Nation v. Hitchcock thus extended the *Kagama* plenary power doctrine to the denial of tribal land rights in the face of a challenge based in part on the Bill of Rights. Not only did Congress's authority derive from its inherent powers over the territories and the Indians' dependent status, but the Court indicated that it would not subject that power to a great degree of scrutiny even against other constitutional provisions. Indeed, Congress's exereise of the power was not subject to review by the courts at all. The Court had now articulated all three prongs of the inherent powers doctrine.

One month later, the Court handed down its decision in *Lone Wolf v. Hitchcock*.[460] *Lone Wolf* involved a challenge by members of the Kiowa, Comanche, and Apache tribes to a 1900 statute alloting tribal lands and opening two million acres of "surplus" lands in the Oklahoma Territory to white settlement in exchange for payment of one dollar per acre to be held in trust for the tribes.[461] The lands at issue had been set aside for the tribes' "absolute and undisturbed use and occupation" in the Medicine Lodge Treaty of 1867,[462] which provided that tribal lands could not be taken without the consent of three-fourths of the adult male members.[463] Nevertheless, Congress adopted the legislation based in part on an allegedly invalid agreement with the tribe.[464]

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458. *Id.* at 307–08.

459. *Id.* at 308.

460. 187 U.S. 553 (1903).

461. *See* Act of June 6, 1900, ch. 813, § 6, 31 Stat. 672, 677.

462. Medicine Lodge Treaty, Oct. 21, 1867, U.S.-Kiowa and Comanche Tribes of Indians, 15 Stat. 581, 585.

463. *Id.* at 585.

464. In 1892, the United States negotiated an agreement with the tribe allotting a portion of the tribal lands and relinquishing the remaining two million "surplus" acres to white settlement. While Congress was considering legislation to enact the 1892 agreement, the tribes renounced it, arguing that the agreement had been extracted with fraudulent representations by the government, that three-quarters of the adult males had not accepted it, and that the legislation being considered by Congress altered the agreement in material ways. The Secretary of the Interior confirmed that the agreement had not received the requisite three-fourths consent, and the Commissioner of Indian

Lone Wolf (who was Chief of the Kiowa Tribe) and other tribal members challenged the Act, arguing that Congress's seizure of Indian lands without their consent violated, *inter alia*, the Fifth Amendment.[465] The trial court rejected the Indians' claim,[466] and on Independence Day, 1901, while the appeal was pending, President McKinley issued a proclamation ordering that the surplus reservation lands be opened to white entry and settlement.[467]

In their brief to the Court, the Indians asserted, more forcefully than in *Cherokee Nation v. Hitchcock*, that the allotment and sale of their lands without their consent would deprive them of property without due process of law and would be an unconstitutional taking under the Fifth Amendment.[468] The Indians contended that the United States had never before asserted a right to terminate Indian rights of occupancy without either Indian consent or just compensation,[469] that the Constitution was in force in the Oklahoma territory and could not be rescinded (under the reasoning of *Downes v. Bidwell*),[470] and that Indians were persons within the meaning of the Fifth Amendment.[471] The Indians denied that the Act constituted a taking of private property for public use; "[i]t was rather the taking . . . of property belonging to Indians and giving it to white men."[472] The petitioners also argued that the 1871 termination of treaty-making only altered the means of ratifying agreements with the Indians and did not otherwise alter Indians' legal status.[473]

Both parties in *Lone Wolf* drew substantially from the immigration and territory inherent powers cases. Citing the decision in *Chae Chan Ping*, Lone Wolf contended that the Medicine Lodge Treaty gave the tribe a vested interest in occupying the property, which could not be disturbed by treaty abrogation.[474] The Indians noted that unlike the "political" right to enter the United States at issue in *Chae Chan Ping*,[475] their vested right at stake was a

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Affairs opposed enactment of the agreement. Nevertheless, Congress adopted the legislation over the tribes' objection. *Lone Wolf*, 187 U.S. at 554–60 (statement of the case).

465. *See id.* at 561 (statement of the case) (detailing the Indians' claims that the Act "deprive[d] said Indians of their lands without due process of law").

466. *Id.* at 562 (statement of the case).

467. *Id.* at 562–63 (statement of the case) (citing Proclamation No. 6, 32 Stat. 1975, 1977 (1901)).

468. Brief for Appellants at 36–40, *Lone Wolf* (No. 275); *id.* at 16 ("Indians occupying lands in this country, under the provisions of treaties or agreements with the United States, cannot be deprived of the use and occupancy of such lands without their consent, except by due process of law; and such lands cannot be taken from them, except in compliance with the provisions under which such lands were acquired." (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889))).

469. *Id.* at 9–10, 62–66.

470. *Id.* at 37–38 (citing Downes v. Bidwell, 182 U.S. 244 (1901)).

471. *Id.* at 38–39.

472. *Id.* at 40.

473. *See id.* at 54.

474. *See id.* at 16.

475. *Id.* at 35–36.

property interest,[476] which the *Chae Chan Ping* decision conceded was not disturbed when the treaty creating it was broken.[477] Congress's repudiation of the treaty did not allow the government to disturb the Indians' property rights.[478] Invoking the Insular territories as an example, the plaintiffs noted that abrogation of the treaty of peace with Spain would not alter the cession of the Philippines and Puerto Rico to the United States.[479]

By the time the Court considered *Cherokee Nation v. Hitchcock* and *Lone Wolf*, the United States no longer sought enumerated constitutional support for its power but simply asserted the power to legislate as a matter of political necessity. Since *Johnson v. M'Intosh*, Van Devanter wrote for the government, Indians had been subject "to the paternal supervision and control of the United States."[480] "While sentimentality may characterize the exercise of absolute authority over the affairs of the Indians as an arrogation of power because of might," Van Devanter wrote in the government's *Lone Wolf* brief, "the exigencies of the situation demanded its assumption and results have justified it."[481] The 1871 Act terminated Indians' status as independent powers capable of negotiating treaties.[482] Now "Congress had plenary power [to legislate] without any such consent."[483] Van Devanter also argued that the State enjoyed a *parens patriae* authority over the Indians[484] and quoted *Church of Latter-Day Saints* for the proposition that "[t]his prerogative of *parens patriae* is inherent in the supreme power of every state."[485]

The government also discussed the litany of territory cases, including *Church of Latter-Day Saints*, *National Bank v. County of Yankton*, and the Insular decisions of *De Lima v. Bidwell* and *Downes v. Bidwell*, for the proposition that Congress enjoyed "supreme" power over the territories as "an incident of sovereignty."[486] The government cited *Chae Chan Ping* both for the proposition that Congress could legislate in contravention of a treaty[487] and to reject the Indians' claim to vested rights.[488]

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476. *Id.*

477. *Id.* at 18–19 (quoting Chae Chan Ping v. United States, 130 U.S. 581, 611 (1889)).

478. *See id.* at 42–43.

479. *Id.* at 71.

480. Brief for Appellees at 13, *Lone Wolf* (No. 275).

481. *Id.* at 19; *see also id.* at 15–16 ("[T]o prevent as far as possible the evil consequences to both parties whieh would necessarily flow from the elash between civilization and savageism, it was neeessary that the Government should intervene and assume complete eontrol over the Indians.").

482. *Id.* at 12–13.

483. *Id.* at 56.

484. *Id.* at 45. Indians, Van Devanter wrote, were akin to "lunatics, minors, and other incapacitated persons." *Id.* at 44–45 (quoting Hoyt v. Sprague, 103 U.S. 613, 634 (1880)).

485. *Id.* at 49 (quoting The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890)).

486. *Id.* at 51–53.

487. *Id.* at 32.

The United States did not contend that the Fifth Amendment was inapplicable to Indians. Instead, it argued that the Indians were receiving just compensation, given that they only enjoyed rights of occupancy,[489] and that the Due Process Clause was not triggered here because the sale of tribal lands "merely changed the form of such property."[490] Congress's determination of how to use these lands, moreover, was a political question.[491] Whether the dissolution of the reservation violated due process, therefore, was not for the courts to determine.

The government closed by invoking a civilizing justifieation for its power:

> The Indians had not become self-supporting and had made no advance in that direction which would justify a hope that they ever would become so under the old system. It was not only the right, but the *imperative duty* of the United States to change this condition of affairs and to make such provision for these people as would start them upon the road to self-support and civilization.[492]

The Supreme Court upheld the Act, embracing the government's argument that Congress enjoyed plenary authority to unilaterally terminate Native American land rights. Writing again for the Court, Justice Edward White asserted that the Indians' claim "ignore[d] the status of the contracting Indians and the relation of dependency they bore . . . towards the government of the United States."[493] White pointed to *Beecher v. Wetherby* and the inherent powers discussion in *Kagama*[494] to hold "that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests" even when the power violated Indian treaties.[495] White again offered no constitutional support for this position and simply treated it as an historical fact:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, *a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf.* But, as with treaties made with foreign nations, (*Chinese Exclusion*

488. *Id.* at 66–68.
489. *Id.* at 69–70.
490. *Id.* at 70–71.
491. *Id.* at 71–73.
492. *Id.* at 93 (emphasis added).
493. Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903).
494. *Id.* at 565–67.
495. *Id.* at 565.

> *Case*, 130 U.S. 581, 600, (1889)), the legislative power might pass laws in conflict with treaties made with the Indians.
>
> [I]t was never doubted that the *power* to abrogate existed in Congress . . . .[496]

The citation to the 1889 decision in *Chae Chan Ping* is revealing. The alien plaintiff in that case invoked existing U.S. treaties and statutes to claim that he had a vested right to return to the United States.[497] The Court, in turn, had applied the last-in-time and inherent powers doctrines to hold that Congress had an absolute power to deny entry to aliens who were long-term U.S. residents, in contravention of existing treaty and statutory promises.[498] The Court held that Congress's control over "political rights," such as membership in the American polity, could not vest because they involved a core sovereign right that could not be bargained away by treaty.[499] Only property rights "vested" under treaties.[500]

The Court in *Lone Wolf*, however, now held that tribal property rights did not vest. The rationale was the same. To uphold the Indians' claim, the Court reasoned, would be to hold that the treaty "materially limit[ed] and qualif[ied] the controlling authority of Congress in respect to the eare and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent . . ., of all power to act, if the assent of the Indians could not be obtained."[501]

As in *Chae Chan Ping*, the Court refused to find anything in either the Constitution or existing treaties that might constrain the power of Congress over Indian affairs. Instead, the power derived from sovereign necessity.[502] In light of Congress's power, White concluded, it was irrelevant whether the Indians had validly consented to the 1892 agreement.[503]

Justice White did not address the Indians' Fifth Amendment claims other than to find that Congress's "full administrative power" over tribal property had been resolved in *Cherokee Nation v. Hitchcock*.[504] Congress's present policy of selling tribal lands without tribal consent was "a mere change in the form of investment of Indian tribal property, . . . [whose

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496. *Id.* at 565–66 (emphasis added).

497. Chae Chan Ping v. United States, 130 U.S. 581, 584–89 (1889) (argument for appellants).

498. *Id.* at 600–06.

499. *Id.* at 609.

500. *Id.* ("The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property . . . not such as are personal and untransferable in their character.").

501. *Lone Wolf*, 187 U.S. at 564.

502. *Id.* at 567–68.

503. *Id.*

504. *Id.* at 568 (citing Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)).

owners were merely] the wards of the government."[505] No deprivation of property had therefore occurred, and the Fifth Amendment afforded no protection where lands held in common by the tribe were concerned.

Finally, in language very reminiscent of *Downes v. Bidwell*, Justice White held that the political question doctrine precluded the Court from questioning Congress's exercise of its plenary power over the Indians:

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.[506]

Lone Wolf was quickly recognized as a significant milestone with vast implications for U.S.-Indian relations. Within a month of the decision, members of the Senate called for the distribution of the opinion as a Senate document.[507] And Senator Matthew Quay, a Republican from Pennsylvania, characterized the decision on the Senate floor as "the *Dred Scott* decision No. 2, except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the white man is bound to respect, and that no treaty or contract made with him is binding."[508]

With the decisions in *Lone Wolf* and *Cherokee Nation v. Hitchcock*, the Court finally ratified the complete inherent powers doctrine over Indian tribes. In the early 1800s, U.S. power over the Indians had been considered limited to actions authorized by the Commerce, War, and Treaty Clauses, and the early cases of *Cherokee Nation* and *Worcester* looked to the Constitution as a possible source of authority over the Indians.[509] The Court largely abandoned this effort with the 1886 decision in *Kagama* for powers other than those that could be readily sustained under the Indian Commerce Clause.[510] *Kagama* upheld the inherent power of Congress to legislate a criminal code for Indian tribes, but did not involve a claim of constitutional constraint based on individual rights.[511] *Cherokee Nation v. Southern Kansas Railway Co.* upheld Congress's power to abrogate an Indian treaty and to

505. *Id.*

506. *Id.*

507. 36 CONG. REC. 2028 (1903) (statement of Sen. Platt).

508. *Id.* (statement of Sen. Matthew Quay).

509. *See supra* notes 241–43 and accompanying text.

510. United States v. Kagama, 118 U.S. 375 (1886); *see also* Dick v. United States, 208 U.S. 340, 359 (1908) (upholding a statute barring introduction of liquor into Indian lands within a state under the Treaty and Indian Commeree Clauses); Cherokee Nation v. S. Kan. Ry., 135 U.S. 641, 657 (1890) (upholding the power of eminent domain under the Indian Commerce Clause).

511. *Kagama*, 118 U.S. at 383.

exercise the powers of eminent domain over tribal lands but did so pursuant to Congress's Indian Commerce Clause authority.[512]

By the end of the century, however, the Court upheld unilateral power to legislate over every aspect of tribal life, including determining tribal citizenship, terminating Indian land rights, and dissolving tribes, even in the face of express treaty provisions to the contrary. The Court in *Cherokee Nation v. Hitchcock* and *Lone Wolf* made absolutely no effort to ground this extraordinary power in any constitutional clause. Instead, the power—like that in *M'Intosh*—was inherent, derived from the Indians' status as dependents and the United States' ultimate control over Indian lands. The power was both unlimited and unreviewable. While it was "presumed" that the United States would exercise its power "by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race,"[513] as in the immigration and territory cases, the Court recognized no specific constitutional limits on its exercise. Finally, Congress's exercise of the power was "a question of governmental policy"[514] and Congress's decisions were "conclusive upon the courts."[515]

G. Inherent Power and Citizenship

The final chapter of the Indian inherent powers decisions involves the doctrine's relationship to citizenship. The dismantling of the tribes from the 1880s to 1900s resulted in a growing number of Native Americans who had been granted American citizenship by treaty or statue.[516] In the 1905 case of *Matter of Heff*, Justice Brewer contended that, although Congress determined when and how to release Indians from guardianship status, the bestowal of citizenship evidenced an effort to "endow them with the full rights of citizenship."[517] Brewer rejected the suggestion that "because one has Indian . . . blood in his veins, he is to be forever one of a special class" subject to extraordinary federal power, regardless of his citizenship status.[518]

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512. *S. Kan. Ry.*, 135 U.S. at 657.

513. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

514. *Id.*

515. *Id.* at 568.

516. As early as 1817, a treaty with the Cherokee Nation granted 640 acres of land to each Indian head of family who resided on lands ceded to the United States and who wished to become a citizen of the United States. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 66 (1831) (Thompson, J., dissenting) (describing the provisions of the treaty). The Treaty of Guadalupe Hidalgo with Mexico declared that all residents of the territory ceded to the United States who did not declare Mexican citizenship became citizens of the United States. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., art. 8, 9 Stat. 922, 929–30 [hereinafter Treaty of Guadalupe Hidalgo]. The Dawes Act of 1887 bestowed citizenship on Indians who were granted allotments by statute or treaty and on Indians who separated from their tribes and "adopted the habits of civilized life." Indian General Allotment (Dawes) Act of 1887, ch. 119, § 6, 24 Stat. 388, 390; *see also* COHEN, *supra* note 131, at 643.

517. *In re* Heff, 197 U.S. 488, 501–02 (1905).

518. *Id.* at 508.

Although Indians continued to hold their lands in trust, Brewer concluded that citizenship otherwise gave an Indian full civil and political status in the community.[519] Thus, Justice Brewer eoncluded, the United States could not enforce its criminal laws barring liquor sales to Indians against an Indian citizen, who was subject instead to the jurisdiction of the state.[520]

Heff was the high water mark for equal Indian citizenship rights during the inherent powers era, but the decision was short-lived. Partly in response to *Heff*, Congress in 1906 adopted the Burke Act, which deferred Indian citizenship under the Dawes Act until after the close of the trust period.[521] In the 1909 case *United States v. Celestine*, Justice Brewer interpreted the Act as indicating "that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty" and held that citizenship did *not* exempt an Indian from exclusive federal criminal jurisdiction or grant him the "privileges and immunities" of U.S. citizens.[522] Retreating from his position in *Heff*, Justice Brewer reasoned that "both [parties] remained Indians by race" and that Congress had not intended, "by the *mere* grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race."[523] Citizenship was in no way inconsistent with the Indians' continuing ward status.

The assertion that race was more important than citizenship in determining Indian rights became even more overt in the 1913 case *United States v. Sandoval*, which again addressed federal authority to criminalize liquor imports into Indian lands within state boundaries.[524] The people of the Santa Clara Pueblo, where the case arose, claimed U.S. citizenship pursuant to the Treaty of Guadalupe Hidalgo.[525] Justice Van Devanter, who had represented the United States in *Lone Wolf*, held that the claim of eitizenship in no way limited federal power. "[C]itizenship [was] not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians."[526] Instead, the United States' guardianship of Indians turned upon other considerations, such as Indian dependence.[527]

519. *Id.* at 509 ("[W]hen the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress . . . .").

520. *Id.*

521. Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 182 (1906) (current version at 25 U.S.C. § 349 (2000)).

522. United States v. Celestine, 215 U.S. 278, 290–91 (1909).

523. *Id.* at 290–91 (emphasis added).

524. United States v. Sandoval, 231 U.S. 28, 38 (1913).

525. *Id.* at 33 (argument for the defendant). The Pueblo had been citizens of Mexico, *id.* at 45, and thus presumably had become citizens under the treaty. The Court, however, considered the question of their eitizenship status as "open." *Id.* at 39. *See also* the Treaty of Guadalupe Hidalgo, *supra* note 516.

526. *Id.* at 48 (citing Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902)).

527. *Id.* at 45.

"[A]s a superior and civilized nation," the United States had the duty of protecting "all dependent Indian communities within its borders."[528] In the present case, protection was warranted, Van Devanter continued, because the Pueblo were an "ignoran[t]," unassimilated and "degraded" race:[529]

> The people of the pueblos . . . [are] Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism [sic], and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.[530]

To support this pseudo-anthropological analysis of the Pueblo nation, Van Devanter cited the works of ethnologists[531] and a series of reports from U.S. Indian superintendents that described the Pueblo as insufficiently advanced to accept the burdens of citizenship, insufficiently informed to vote, lacking marriage institutions, and engaging in cruel and unusual punishments, polygamy, prostitution, and secret pagan customs amounting to "a ribald system of debauchery."[532] "Until the old customs and Indian practices are broken among this people," the reports observed, "we cannot hope for a great amount of progress."[533] In other words, the critical question for the bestowal of rights was not whether the Pueblo were *citizens* but whether they were *civilized.* Although the Court had previously recognized the Pueblo nation as an advanced civilization, Justice Van Devanter concluded that that case was not based on the complete information regarding the Pueblo character that was now available.[534]

Finally, in the 1916 decision *United States v. Nice*, Justice Van Devanter directly reversed the holding in *Heff*, concluding that "[c]itizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection."[535]

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528. *Id.* at 46 (citing United States v. Kagama, 118 U.S. 375, 384 (1886)).

529. *Id.* at 45.

530. *Id.* at 39.

531. *Id.* at 44.

532. *Id.* at 42, 41–44.

533. *Id.* at 42; *see also id.* at 43 ("As long as they are permitted to live a communal life and exercise their ancient form of government, just so long will there be ignorant and wild Indians to civilize." (quoting the opinion of the lower court)).

534. *Id.* at 48–49 (rejecting United States v. Joseph, 94 U.S. 614, 616 (1876)) ("[The Pueblos] are a peaccable, industrious, intelligent, honest, and virtuous people." (internal quotations omitted)).

535. United States v. Nice, 241 U.S. 591, 598 (1916). Following World War I, Congress granted citizenship to those Native Americans who had served in the military. Act of Nov. 6, 1919, ch. 95, 41 Stat. 350. Congress in 1924 bestowed statutory citizenship on most remaining Indians, without altering their ward status. Act of June 2, 1924, ch. 233, 433 Stat. 253.

In short, during the inherent powers era, citizenship was insufficient, without more, to grant Indians full membership in the American polity. Where the Court declined to assume, in *Elk*, that the Fourteenth Amendment granted citizenship to tribal members, the Court now declined to second-guess Congress's definition of the citizenship rights of Indians.

H. The Constitutionalization of Inherent Power over Indians

The Indian plenary power doctrine has proven remarkably durable in the last century. From the 1890s on, the Court relied on inherent power over the Indians in cases involving the condemnation of lands and the sale of liquor that the Court acknowledged it could have otherwise decided under the Commerce Clause.[536] As late as 1942, well after Indians were granted citizenship, lower courts continued to portray Congress's power over tribes as "[f]ull; entire; complete; absolute; perfect; [and] unqualified."[537] And in 1955, the Court invoked the discovery doctrine at length to hold that the government could take lands that Indians held under original Indian title without just compensation, because Congress's power was "supreme."[538] Natural-born citizenship for Indians born as tribal members continues to be bestowed by statute,[539] rather than as a matter of constitutional right, and commentators have questioned whether Congress, under the plenary power doctrine, might retain power to de-naturalize Indians.[540]

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536. *See Nice*, 241 U.S. at 599–600 (finding that Congress enjoys both constitutional (Commerce Clause) and extraconstitutional (tribal dependence) power over tribes); Perrin v. United States, 232 U.S. 478, 482 (1914) (stating that Congress's power to regulate liquor sales "arises in part" from the Commerce Clause "and in part from the recognized relation of tribal Indians to the Federal Government"); United States v. Sandoval, 231 U.S. 28, 45–46 (1913) ("Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but . . . the United States as a superior and civilized nation [has] the power and the duty of exercising a fostering care and protection over [the Indians]."); Cherokee Nation v. S. Kan. Ry., 135 U.S. 641, 657–58 (1890) (upholding federal condemnation of tribal lands for a railway on Commerce Clause and inherent powers grounds).

537. Mashunkashey v. Mashunkashey, 134 P.2d 976, 979 (Okla. 1942) (internal quotations omitted).

538. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279–81 (1955) ("Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."); *see also* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) (holding that the "[e]xtinguishment of Indian title based on aboriginal possession" raises "political, not justiciable, issues").

539. 8 U.S.C. § 1401(b) (1994).

540. The plenary power doctrine would have to supersede the Fourteenth Amendment's recognition of naturalized citizenship, U.S. CONST. amend. XIV, § 1, cl. 1, and the doctrine in *Afroyim v. Rusk* that naturalized citizens are protected against expatriation. Afroyim v. Rusk, 387 U.S. 253 (1967) (holding that the Fourteenth Amendment prohibits Congress from involuntarily stripping a citizen of citizenship). As David Williams has noted, statutory Indian citizenship differs from other forms of naturalized citizenship both because Indians do not possess all the constitutional rights of other citizens, and because, under *Elk*, Indians who are tribal members are not "subject to the jurisdiction of the United States" like other naturalized citizens and thus may not be as protected by the Fourteenth Amendment against denaturalization under the reasoning of *Afroyim v. Rusk*. Williams nevertheless concludes that withdrawal of Indian citizenship would be

The Court, however, also began to bring the doctrine within the folds of the Constitution and gradually relocated the power to the Constitution's enumerated clauses. After the *Insular Cases* resurrected the Territory Clause as a source of federal power, the Court began to rely on that clause to uphold Indian regulatory power.[541] The Court also relaxed the Indian Commerce Clause doctrine in the post-*Schechter Poultry* era, and in 1974, the Court rejected any extraconstitutional basis of the authority, holding that the power was "drawn both explicitly and implicitly from the Constitution itself."[542] By 1989, the Court confirmed that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."[543]

The Court has also recognized some constitutional constraints on congressional power. In the 1914 decision *Perrin v. United States*, the Court adopted a "not . . . purely arbitrary" standard for review of Indian legislation, holding that Congress's plenary power "does not go beyond what is reasonably essential to [the Indians'] protection, and . . . its exercise must not be purely arbitrary, but founded upon some reasonable basis."[544] The Court, however, simultaneously conceded that Congress had "wide discretion" in determining what was reasonably essential, and that "its action, unless purely arbitrary, must be accepted and given full effect by the courts."[545] The Court has subsequently recognized that at least rational basis due process analysis applies to congressional management of Indian affairs.[546] The Court correspondingly has retreated from the presumption that congressional decisions pose political questions not subject to judicial scrutiny:

> The statement in *Lone Wolf* that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate

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improper. David C. Williams, *The Borders of the Equal Protection Clause: Indians As Peoples*, 38 UCLA L. REV. 759, 859–61 (1991).

541. *E.g.*, United States v. Celestine, 215 U.S. 278, 284 (1909) (relying on the Territory Clause to hold that federal courts have jurisdiction to try crimes committed on Indian lands).

542. Morton v. Mancari, 417 U.S. 535, 551–52 (1974); *see also* McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

543. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); *see also* Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 543 (1996) ("[R]ecently, the Court has moved away from *Kagama*'s suggestion of extraconstitutional powers and has instead grounded Congress's power over Indians . . . in the Indian Commerce Clause and, at least to some extent, the Treaty Clause of Article II.").

544. Perrin v. United States, 232 U.S. 478, 486 (1914).

545. *Id.*

546. *See Mancari*, 417 U.S. at 55 (noting that the Court will review, under the Due Process Clause, whether congressional action was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

> treaties has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment.[547]

The Court accordingly has applied the Fifth Amendment Takings Clause to lands that the federal government bestowed by treaty or statute to the Indians, finding that the plenary power doctrine did not allow the United States to take tribal lands without compensation.[548] And in 1977, the Supreme Court held that federal action affecting Indians was subject to Fifth Amendment equal protection principles.[549]

Nevertheless, the Court has relaxed its equal protection scrutiny in this context, treating Indian tribes as political, rather than racial, groups and concluding that distinctions based on Indian status are accordingly reviewed only for a rational basis.[550] Indians today benefit in some ways from this relaxed review in that the courts have allowed Congress to pass "protective" legislation that bestows benefits on tribes that would not survive equal protection scrutiny in other contexts.[551]

Most notably, in its 1996 decision in *Seminole Tribe v. Florida*, the Court surprisingly held that Congress's power under the Indian Commerce Clause was insufficient to overcome Eleventh Amendment objections to a federal statute authorizing tribes to sue states.[552] And in 1999, the Court implied that the President had no extraconstitutional, inherent authority to terminate tribal rights.[553] Finally, as in the immigration area,[554] the Supreme

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547. Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977) (citations omitted); *accord* United States v. Sioux Nation, 448 U.S. 371 (1980) (holding that the Court has rejected *Lone Wolf*'s blanket embrace of the political question doctrine).

548. *See* Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937) (holding that the government may not appropriate tribal lands without just compensation); United States v. Creek Nation, 295 U.S. 103, 110 (1935) (holding that U.S. guardianship of tribes "was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions" and did not authorize tribal lands held in fee simple to be taken without just compensation); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919) (finding that a tribe possessing lands in fee simple may maintain injunctive action against confiscation); Choate v. Trapp, 224 U.S. 665, 678 (1912) (holding that land rights bestowed by Congress to individual Indians are protected by the Fifth Amendment); *see also* Babbitt v. Youpee, 519 U.S. 234, 237 (1997) (upholding a Fifth Amendment takings and just compensation challenge to a federal escheat statute); United States v. Sioux Nation, 448 U.S. 371, 407–23 (1980) (upholding a suit by the Sioux nation for the 1877 taking of tribal lands).

549. Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977) (rejecting a challenge to federal Indian employment preferences as racially discriminatory under the Fifth Amendment).

550. *Id.* at 85; *see also Mancari*, 417 U.S. at 553 (rejecting the contention that an Indian employment preference constitutes a "racial preference").

551. Frickey, *Domesticating*, *supra* note 52, at 49–50.

552. Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996); *see also* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 12 (1999) (discussing *Seminole Tribe*).

553. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188–89 (1999) ("The President's power, if any, to issue the [Indian removal] order must stem either from an act of

Court has developed sub-constitutional canons of construction that restrain the most abusive manifestations of the plenary power doctrine by requiring a clear statement by Congress before it can restrict Indian rights.[555] The judiciary, however, continues to give Congress broad deference in cases involving property and tribal sovereignty,[556] and "the Court has never invalidated a statute on the ground that it violated any eollective tribal sovereignty interests."[557]

Thus, over time, the Court has reinterpreted the plenary power doctrine to be a broad federal power deriving from the Constitution's textual provisions, which is limited to some extent by the Bill of Rights and is subject to highly deferential judicial review. In short, the authority is treated much like the modern foreign affairs power. What, if any, impact the Court's recent Eleventh Amendment[558] and Commerce Clause[559] decisions will have on federal power over Indians remains unclear. It is possible that the decision in *Seminole Tribe* merely reflects the same willingness to impose *structural* limitations on federal plenary authority that the Court exhibited in the immigration context in *INS v. Chadha*,[560] and that the Court will not use its newly restrictive approach to the Commerce Clause to substantively constrain the federal Indian power. The Court certainly has never imposed the level of scrutiny on congressional Commerce Clause authority over Indians that it applied in the pre-1937 interstate commerce context. On the other hand, *Seminole Tribe* concluded that there is "no principled distinction" between the Indian and Interstate Commerce Clauses for purposes of congressional power to abrogate states' Eleventh Amendment

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Congress or from the Constitution itself." (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952))).

554. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1656–79 (1992) (arguing that courts in the immigration context have employed procedural protections in lieu of substantive constitutional rights).

555. Hagen v. Utah, 510 U.S. 399, 422–24 (1994) (Blackmun, J., dissenting) (discussing canons of construction for Indian law).

556. Newton, *supra* note 52, at 235.

557. Frickey, *Domesticating*, *supra* note 52, at 44 n.61.

558. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that states enjoy Eleventh Amendment immunity from suits under the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (finding state immunity from suit under the Age Discrimination in Employment Act); Alden v. Maine, 527 U.S. 706 (1999) (announcing that states are immune from suit under the Fair Labor Standards Act); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that states enjoy Eleventh Amendment immunity from suits by Indian tribes under the Indian Gaming Regulatory Act).

559. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act under the Interstate Commerce Clause); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act as exceeding Congress's Commerce Clause power).

560. 462 U.S. 919 (1983).

immunity.[561] This holding leaves open the question whether the Court's newly reaffirmed limitations on the Interstate Commerce Clause may also impose limits on federal power under the Indian Commerce Clause.[562] It is highly uncertain, for example, that either the Major Crimes Act or the Indian Civil Rights Act[563] would survive *Lopez-Morrison* Commerce Clause scrutiny, although at least one lower court has upheld the Major Crimes Act against a *Lopez* challenge.[564]

IV. Inherent Authority over Immigration

There is also little reason to believe that the Framers contemplated creating a federal immigration power. One of the grievances directed against the Crown in the Declaration of Independence was that the King had obstructed free immigration to the colonies.[565] And at the time of the framing, the United States generally encouraged free immigration, while various states maintained laws authorizing the expulsion of aliens deemed undesirable.[566] In 1788, after the Constitutional Convention, the Congress of the Confederation recommended that the several states "pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States."[567] The action was later viewed by some as confirming the states' primacy in regulating the entry and exit of aliens.[568]

The constitutional text does not expressly address authority to regulate immigration, and the location and scope of the immigration power were hotly contested throughout the first three-quarters of the nineteenth century. The Naturalization Clause authorizes Congress to "establish a uniform rule of Naturalization,"[569] but this most clearly addresses questions of citizenship, not admission and expulsion of aliens.[570] The Migration Clause potentially

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561. *Seminole Tribe*, 517 U.S. at 63.

562. United States v. Doherty, 126 F.3d 769, 778 n.2 (6th Cir. 1997).

563. Indian Civil Rights Act of 1968, Pub. L. No. 90–284, tit. II, 82 Stat. 73, 77–78 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (1994)) (applying most provisions of the Bill of Rights to relations between tribes and their members).

564. United States v. Lomayaoma, 86 F.3d 142, 145–46 (9th Cir. 1996).

565. DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776) (stating that the King had "endeavoured to prevent the population of these States" by "obstructing the Laws for Naturalization of Foreigners; [and] refusing to pass [other laws] to encourage their migration hither").

566. As Gerald Neuman has documented, early state laws excluded aliens who were convicts, poor, sick, disabled, free blacks, or ideologically undesirable, and barred the importation of foreign slaves. NEUMAN, *supra* note 54, at 21–43.

567. 13 J. OF CONG. 105–06 (Sept. 16, 1788); *see also* NEUMAN, *supra* note 54, at 21–22 (discussing the resolution).

568. *See* New York v. Miln, 36 U.S. 102, 149 (1837) (Thompson, J., concurring) (describing the act as "a strong contemporaneous expression . . . that this was a power resting with the states").

569. U.S. CONST. art. I, § 8, cl. 4.

570. Debates in Congress over the first naturalization law suggest that the early Congress may have viewed the clause as creating a general federal authority over immigration. *See, e.g.*, 1 ANNALS OF CONG. 1147–64 (Joseph Gales ed., 1790) (discussing the 1790 naturalization act); *see*

offers the Constitution's most express reference to control of alien migration.[571] Read literally, the clause suggests that Congress may prohibit "the migration" of "persons" as well as the importation of slaves. Although the clause is now commonly understood to refer only to the slave trade, its applicability to broader immigration issues was a source of debate through much of the nineteenth century.[572] The Taxation Clause, which bars states from imposing "duties or imposts" on "imports,"[573] was also pointed to by supporters of a federal immigration power, though supporters of state power

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also JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 236–39 (1978). *But see* The Passenger Cases, 48 U.S. 283, 526–27 (1849) (Woodbury, J., dissenting) (arguing that the first naturalization laws recognized a *state* immigration power by allowing states to participate in citizenship decisions).

571. U.S. CONST. art. 1, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

572. The meaning of the phrase "Migration or Importation" is unclear, and unfortunately, there is little drafting history to clarify the issue. Some early commentators maintained that "migration" and "importation" were synonyms, and that the terms "persons" and "migration" were used simply to mollify those who wished to avoid mentioning slavery in the Constitution. *See The Passenger Cases*, 48 U.S. at 513. An unsuccessful attempt was made at the Convention to strike the word migration. *See id.* at 453. For a discussion of the drafting history, see *id.* at 453–54 (McKinley, J., concurring); *id.* at 512–13 (Daniel, J., dissenting); *id.* at 542–43 (Woodbury, J., dissenting). Before the Constitution was adopted, Madison rejected the effort by Antifederalists to "pervert this clause" by presenting it "as calculated to prevent voluntary and beneficial emigrations from Europe to America." THE FEDERALIST No. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST No. 44, at 280 (James Madison) (Clinton Rossiter ed., 1961). Jefferson contended in the Fifth Kentucky Resolution of 1789 that the Migration Clause barred Congress from regulating immigration *prior* to 1808, *see* Kentucky Resolution, 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 541 (J.B. Lipincott Co., 2d ed. 1907) [hereinafter ELLIOT'S DEBATES], while House Speaker John Dayton of New Jersey responded that the clause did not contemplate persons other than slaves. 8 ANNALS OF CONG. 1992–93 (1798). Madison's 1799 report to the Virginia legislature argued that the clause was limited to the slave trade. 4 ELLIOT'S DEBATES, *supra*, at 541 [hereinafter Madison's Report]. In *Gibbons v. Ogden*, Chief Justice Marshall viewed the clause as applying to both free and forced immigration. 22 U.S. 1, 216–17 ("[T]his section proves that the power to regulate commerce applies equally to the regulations of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily."). In the *Passenger Cases*, the Supreme Court divided sharply over the applicability of the Migration Clause to voluntary immigrants. *Compare* 48 U.S. at 413–14 (Wayne, J., concurring) (arguing that the clause includes "the migration of other persons, as well as the importation of slaves"), *and id.* at 453 (McKinley, J., concurring) (concluding that "there are two separate and distinct classes of persons intended to be provided for by this clause"), *with id.* at 476 (Taney, C.J., dissenting) (insisting that the clause "was intended to embrace those persons only who were brought in as property"), *id.* at 511–14 (Daniel, J., dissenting) (agreeing that the clause was limited to the slave trade), *and id.* at 542–43 (Woodbury, J., dissenting) (suggesting that "[t]he word 'migration' was probably added to 'importation' to cover slaves when regarded as persons rather than property"). In 1883, the Court finally rejected the Migration Clause as a basis for the immigration power. New York v. Compagnie Générale Transatlantique, 107 U.S. 59, 62 (1883) ("There has never been any doubt that this clause had exclusive reference to persons of the African race.").

573. U.S. CONST. art. 1, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."); *see also id.* art. 1, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . . .").

denied that voluntary immigrants could constitute "imports."[574] As with authority over Indians, other plausible enumerated sources of the immigration power were the treaty,[575] foreign commerce,[576] and war powers.[577] Otherwise, the Constitution is silent regarding governmental control over aliens.

A. International Law

International law figured prominently in nineteenth century debates over the immigration power.[578] The Supreme Court's late-nineteenth-century decisions implicated two strains of international law regarding the power of states over aliens—the authority to bar, or "exclude," newly arriving aliens from entering a nation's borders, and the power over resident aliens who previously had been given permission to enter. In both cases, the Supreme Court ultimately took the position that international law gave nations absolute power to exclude aliens seeking admission and to deport aliens no longer deemed desirable. Contemporary international law scholars, however, disagreed regarding the scope of these powers, and the applicable international law doctrines were significantly more modulated than the Supreme Court recognized.

International law commentators generally viewed authority over foreign nationals as deriving from international rules regarding commerce or the state's right to self-preservation. With respect to exclusion, principles of sovereignty and territoriality provided that states had authority to protect themselves from undesirable aliens seeking entry, but this power was not absolute. Writing in the 1600s, Samuel Pufendorf reasoned that admitting strangers was among the "dut[ies] of humanity," but that no law required countries to admit strangers who came "unnecessarily and without good reason."[579] While "[e]very state may reach a decision . . . on the admission

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574. *Compare The Passenger Cases*, 48 U.S. at 408 (McLean, J.) ("A tax or duty upon tonnage, merchandise, or passengers is a regulation of commerce, and cannot be laid by a State, except under the sanction of Congress . . . ."), *and id.* at 421 (Wayne, J., concurring) (stating that "under the power given to Congress . . . it may . . . tax persons as well as things, as the condition of their admission into the United States"), *with id.* at 506 (Daniel, J., dissenting) (stating that "alien passengers . . . never can . . . be classed with the subjects of sale, barter, or traffic"), *and id.* at 535 (Woodbury, J., dissenting) ("An *import* . . . does not include persons unless they are brought in as property.").

575. U.S. CONST. art. II, § 2, cl. 2.

576. U.S. CONST. art. I, § 8, cl. 3.

577. *See generally* U.S. CONST. art. I, § 8.

578. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889), discussed *infra* notes 862–918 and accompanying text; Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892), discussed *infra* notes 919–37 and accompanying text; Fong Yue Ting v. United States, 149 U.S. 698 (1893), discussed *infra* notes 938–1025 and accompanying text.

579. 2 SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS, bk. III, ch. III, § IX, at 192–93 (1703).

of foreigners who come to it for other reasons that are necessary and deserving of sympathy," he wrote, "no one can question the barbarity of showing an indiscriminate hostility to those who come on a peaceful mission."[580]

Vattel's own writings on the topic a century later were equally ambiguous. In a passage favored by those advocating an absolute sovereign power to exclude, Vattel wrote: "The sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty."[581] Vattel tied this qualified authority to self-preservation, maintaining that "every nation has a right to refuse admitting a foreigner into her territory, *when he cannot enter it without exposing the nation to evident danger, or doing her a manifest injury.*"[582] Vattel reasoned that exclusion of aliens required "particular and substantial reasons,"[583] including infection with contagious diseases, creation of religious disturbance, or "just cause to fear that they will corrupt the manners of the citizens . . . or occasion any other disorder, contrary to the public safety."[584] Accordingly, the sovereign "cannot, without particular and important reasons, refuse permission, either to pass through or reside in the country, to foreigners who desire it for lawful purposes."[585] Vattel's position was further complicated by the fact that he viewed the restrictions on the sovereign's right to exclude as largely "internal" or imperfect, governed by the sovereign's conscience, rather than external rights which could be enforced by other states.[586] As a matter of external right, each nation was authorized to judge for itself the necessity of any restriction.[587]

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580. *Id.* at 194.

581. VATTEL, *supra* note 56, bk. II, ch. VIII, § 94, at 169–70. For further discussion, see James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 809 (1983) (collecting views of international publicists and concluding that "[b]efore the late 19th century, there was little, in principle, to support the absolute exclusion of aliens").

582. VATTEL, *supra* note 56, bk. I, ch. XIX, § 230, at 107 (emphasis added); *see also id.* bk. II, ch. VIII, § 100, at 171 ("[T]he lord of a territory may, whenever he thinks proper, forbid its being entered . . . . [However, under certain circumstances the lord] cannot refuse an entrance into his territory; and . . . his duty towards all mankind obliges him, on other occasions, to allow . . . a residence in his state.").

583. *Id.* bk. I, ch. XIX, § 230, at 108.

584. *Id.* at 107.

585. *Id.* bk. II, ch. X, § 135, at 184–85.

586. *Id.* Vattel's treatise generally distinguished between "external" and "perfect" obligations, which created rights among nations whose violation could be redressed by force, and "internal" and "imperfect" obligations, which were binding on states as a matter of conscience, merely giving other states the right to object. *Id.* Preliminaries, § 17–18, at lxii. *See also* Nafziger, *supra* note 581, at 811–15; NEUMAN, *supra* note 54, at 11–12.

587. VATTEL, *supra* note 56, bk. I, ch. XIX, § 230, at 107 ("[I]t belongs to the nation to judge, whether her circumstances will or will not justify the admission of that foreigner.").

Robert Phillimore's 1854 treatise took an absolutist view of exclusion: "It is a received maxim of international law that the government of a state may prohibit the entrance of strangers into the country."[588] Even Phillimore, however, noted that it was "the policy of wise States . . . to open wide the door for the reception and naturalisation of foreigners."[589] Theodore Woolsey, who wrote only a few years before the first Chinese exclusion law was passed, opined that "sovereignty in the strictest sense authorizes a nation to decide upon what terms it will have intercourse with foreigners and even to shut out all mankind from its borders,"[590] but qualified this statement by noting, "Entire non-intercourse shuts a nation out from being a partner in international law."[591] Thus, Woolsey concluded, "No state can exclude the properly documented subjects of another friendly state or send them away after they have been once admitted without definite reasons, which must be submitted to the foreign government concerned."[592] Edward Creasy noted "the perfect Right of a State to Independence gives it the power, according to Positive International Law, . . . [to] place what restrictions it thinks fit on the access of foreigners to its coasts or to its interior territories."[593] He also observed, however, that "the withdrawal of ancient courtesies and of indulgences, . . . would be a breach of the Comity of Nations,"[594] and that exclusions "have always been and always must be of very rare occurrence."[595] James Reddie likewise contended that there was "no legal right, in any state, to compel another state to admit its inhabitants,"[596] and that a state's "exclusive rights of dominion . . . would authorize the denial of entry, or passage to all foreigners."[597] He noted, however, that European powers generally accorded each other "liberty of entry, passage and residence."[598] In his proposed international law code of 1876, which he contended reflected existing practice, David Dudley Field observed, "No nation has the right to interdict, absolutely, the entrance of foreigners into its territory," and that "[m]embers of any nation . . . may freely enter, reside and become domiciled in any other nation, . . . subject to the revenue, sanitary,

588. I ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW, pt. III, ch. X, at 233 (1854).

589. *Id.* ch. XVIII, at 348.

590. WOOLSEY, *supra* note 141, ch. III, § 59, at 93.

591. *Id.* at 94.

592. *Id.*; *accord* A.G. HEFFTER, LE DROIT INTERNATIONAL DE L'EUROPE § 33 (Jules Bergson trans., 4th ed. 1883). *See also* EDWARD S. CREASY, FIRST PLATFORM OF INTERNATIONAL LAW 200–01 (1876) (discussing the Woolsey and Heffter rule).

593. CREASY, *supra* note 592, at 196.

594. *Id.*

595. *Id.* at 197.

596. JAMES REDDIE, INQUIRIES INTO INTERNATIONAL LAW 208 (1842).

597. *Id.* at 204.

598. *Id.* at 205.

police and other laws of the country."[599] Field noted that international law recognized exceptions for paupers, criminals, and enemy aliens.[600] Field contended that although international law originally took a more absolutist view toward a state's authority to exclude, the stringent position of Phillimore and Martens was not in harmony with the general spirit of international law, as now manifested,[601] and that the more generous position was now settled by many international treaties.[602]

International law rules regarding obligations toward resident aliens were also somewhat ambiguous. Commentators recognized that lawfully admitted aliens were "entitled to the ordinary protection of person and property" even if not entitled to citizenship.[603] Vattel maintained that the sovereign who admitted aliens "engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him."[604] A number of commentators saw some limitation on the power of the state to expel foreign residents, once duly admitted. Pufendorf interpreted Grotius and St. Ambrose as prohibiting the expulsion of foreigners, even in cases of famine.[605] Pufendorf himself concluded that "to expel without probable cause guests and strangers, once admitted, surely savours of inhumanity and disdain."[606] Denizens, or long-term lawful alien residents, were recognized by some international law commentators as possessing greater rights than aliens seeking entry or temporary residence.[607] Two centuries after Pufendorf, Creasy, for example, took the position that

> it is a heinous wrong to withdraw suddenly privileges, . . . and to practice spoliation, imprisonment, or ruinous expulsion upon those foreigners who have been exercising them, in all cases where long usage has nurtured a well-founded expectation on the part of the foreigners that such privileges would continue to be respected. In

599. DAVID DUDLEY FIELD, OUTLINES OF AN INTERNATIONAL CODE 163–64 (photo. reprint 2001) (2d ed. 1876) (citing JAMES KENT, COMMENTARY ON INTERNATIONAL LAW 35 (J.T. Arby ed., 2d ed. 1878)).

600. *Id.* at 164.

601. *Id.* at 165.

602. *Id.* at 164.

603. REDDIE, *supra* note 596, at 208 ("The foreigners thus admitted are, of course, not entitled to the rights of citizens, nor to any general political or municipal privileges; they are aliens, unless naturalized in the manner prescribed by the internal law of the particular state. But, even as aliens, they are entitled to the ordinary protection of person and property.").

604. VATTEL, *supra* note 56, bk. II, ch. VIII, § 104, at 173.

605. PUFENDORF, *supra* note 579, bk. III, ch. III, § 9, at 365–66.

606. *Id.* at 365.

607. VATTEL, *supra* note 56, bk. I, ch. XIX, § 213, at 101 (distinguishing between alien inhabitants, who were "[b]ound to the society by their residence," but enjoyed "only the advantages which the law or custom gives them," and perpetual inhabitants, who were "a kind of citizens of an inferior order"); WOOLSEY, *supra* note 141, § 62, at 98–99 (arguing that foreigners admitted to a country should be accorded "all private rights," though the law may "place them in an inferior position to the native-born subject").

> such cases there is an implied promise on the part of the recipient nation to continue to respect those privileges.[608]

David Dudley Field provided in his model code that "[n]o nation can expel the members of another nation without special cause, which must be explained to the nation the members of which are expelled."[609] Field contended that this rule comported with that of Woolsey and Heffter, and was "more reasonable and liberal" than the rule laid down by Phillimore.[610]

On the other hand, Théodore Ortolan maintained that under international law the resident alien, who was "not part of the nation," was received into a foreign state's territory "by simple tolerance, and in no way by obligation," though he recognized that this international law rule was subject to the domestic laws of each state.[611] Phillimore took a more absolutist view of expulsion in his public international law treatise. Given the state's power to prohibit entry, the state equally could "regulate the conditions under which [foreigners] shall be allowed to remain" or "compel their departure from it."[612] Phillimore noted that the European custom had been to order the departure of aliens in times of revolution, though such laws had generally been of very limited duration.[613] In his later volume on private international law, however, Phillimore took a more qualified approach:

> If by long usage and custom [foreigners] have been allowed to enjoy certain rights; and these, though originally the fruit of free concession, are violently, suddenly, and without equitable notice, withdrawn from them; an injury is done to them, for which it is the duty of their own State to obtain reparation, the denial of which justifies a recourse to *reprisals or war* . . . .[614]

Accordingly, by the time of the Chinese Exclusion decision in 1889 and its progeny, international law doctrine itself was qualified regarding the power to exclude or expel aliens.

B. The Alien Act

Both the scope of constitutional and international law authority over aliens and the question of inherent powers were central to the debates over

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608. CREASY, *supra* note 592, at 201.

609. FIELD, *supra* note 599, at 165.

610. *Id.*

611. THÉODORE ORTOLAN, RÈGELES INTERNATIONALES ET DIPLOMATE DE LA MER, bk. II, ch. XIV, at 297 (Author trans., Paris, Pon. 4th ed. 1864) (1845).

612. 1 PHILLIMORE, *supra* note 588, pt. III, ch. X, at 233. *See also* 1 *id.* pt. III, ch. XXI, at 407 (noting "the right of the State, into which he has migrated, to send the foreign citizen back to his own home"). Phillimore acknowledged, however, that aliens who had taken up permanent residence in another state were "*de facto* though not *de jure* citizens of the country of their [domicile]." 1 *id.* ch. XVIII, at 347.

613. 1 *id.* ch. X, at 233.

614. 4 PHILLIMORE, *supra* note 588, eh. I, at 3.

the Alien Act of 1798. The Act, which was the partner of the infamous Sedition Act, authorized the President to summarily expel any alien based on a suspicion of dangerousness.[615] The Act was sponsored by the Adams administration as part of a package of xenophobic legislation targeting aliens and the Jeffersonian Republicans during the tensions that led to the undeclared war with France.[616] The Alien Act's indiscriminate application to all aliens, including lawful, friendly resident aliens, provoked a significant controversy about the rights of aliens and the scope of federal power.[617] The dispute culminated in the Virginia and Kentucky Resolutions of 1798, the February 1799 House Report and statements of northern states drafted in response to the resolutions, and Madison's 1800 Report to the Virginia Legislature on the Virginia Resolutions. The debate on federal power over aliens formed part of the broader controversy regarding states' rights and the political struggle for predominance between Adams and Jefferson.[618]

The controversy over the Alien Act presaged the legal controversy of the late 1800s over the Chinese Exclusion laws and forged many of the

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615. Alien Act, ch. 58, 1 Stat. 570 (1798). The Act established a compulsory registration requirement for foreign residents and authorized the President "to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States." *Id.* § 1, 1 Stat. at 571. Aliens ordered to depart who were "found at large . . . after the time limited in such order for his departure . . . [would], on conviction thereof, be imprisoned for a term." *Id.* The Act expired by its own terms on June 25, 1800.

616. In response to the XYZ affair and perceived interference in U.S. domestic and foreign policies by hostile European powers and French revolutionaries, Congress adopted the Sedition Act, ch. 74, 1 Stat. 596, and extended the residency requirement for naturalization from five to fourteen years. Act of June 18, 1798, ch. 54, § 1, 1 Stat. 566 (repealed 1802). In addition to the notorious Alien Act, Congress adopted a more specific "Alien Enemies Act," which incorporated established principles of international law regarding alien subjects of a hostile power, and which was uncontroversially recognized as a proper exercise of the war powers for the expulsion of enemy aliens. Act of July 6, 1798, ch. 66, 1 Stat. 577. A similar version of the Alien Enemies Act remains on the books today. *See* 50 U.S.C. §§ 21–23 (1994). For further discussion of the background to the Act, see JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 3–22 (1956) (arguing that "[d]espite its close association with these diplomatic events, the legislation was the result of a move directed against domestic dissention and disaffection rather than foreign danger") and William F. Swindler, *Seditious Aliens and Native "Seditionists"*, 1984 Y.B. SUPREME COURT HISTORICAL SOCIETY 12–14 (citing the influence of the French Revolution and the presence of French agents in America as context for the Act). In the weeks immediately surrounding the adoption of the Alien Act, Congress also suspended commercial intercourse with France, Act of June 13, 1798, ch. 55, 1 Stat. 565, authorized the defense of U.S. merchant vessels, Act of June 25, 1798, ch. 60, 1 Stat. 572, terminated U.S. treaties with France, Act of July 7, 1798, ch. 67, 1 Stat. 578, and authorized the capture of French war vessels, Act of July 9, 1798, ch. 68, 1 Stat. 578.

617. The ensuing discussion owes a particular debt to the eloquent discussion of the theories of constitutional law prevailing in the debates over the Alien and Sedition Acts set forth in Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927–38 (1991); *see also* NEUMAN, *supra* note 54, at 52–60.

618. Most aliens at the time supported the Jeffersonian Republicans. SMITH, *supra* note 616, at 22–25.

positions that reemerged at that time, including arguments regarding sovereignty, international law, and the constitutional rights of aliens. However, arguments in 1798 and 1799 that the *source* of the power to expel aliens derived from inherent powers played a minimal role in the debates. Both supporters and opponents of the Act contended that while international law established that a sovereign nation *might possibly* exercise such power over aliens, the constitutional distribution of powers determined whether and by whom the power could be exercised in the United States. In other words, while many opponents conceded that international law would allow a sovereigu to exercise this power, few if any supporters claimed that this international law principle alone could authorize the United States to exercise this power.

The opening volley in the House debate on the constitutionality of the Act framed the question in a manner that was, for the most part, accepted throughout the debate. Albert Gallatin of Pennsylvania, a Jeffersonian and opponent of the Act, stated that

> it must be agreed by all that every nation had a right to permit or exclude alien friends from entering within the bounds of their society. This is a right inherent in every independent nation; but that power is vested, according to the Constitutions of different countries, in one or other branch of the Government. In this country, he contended, that the power to admit, or to exclude alien friends, does solely belong to each individual State, and that the General Government has no power over them, and therefore, that all the provisions in this bill [are] perfectly unconstitutional.[619]

Gallatin continued by arguing that the bill was not within the enumerated powers of the national government.[620] By contrast, some supporters concluded that the international law rule was incorporated into the Constitution's enumerated clauses, and that Congress could authorize the expulsion of friendly aliens under the war powers and other constitutional clauses. Accordingly, the House Report defending the Act invoked international law in support of the power to expel, but ultimately lodged the power in the Constitution:

> It is contended that Congress have no power to pass a law for removing aliens.
>
> . . . To this it is answered, that the asylum given by a nation to foreigners, is mere matter of favor, resumable at the public will. On this point, abundant authorities might be adduced, but the common practice of nations attests the principle.

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619. 8 ANNALS OF CONG. 1955 (1798).

620. *Id.* ("If there is any clause in the Constitution which prohibits individual States from exercising this power, or which gives it to the General Government, he should be glad to have it pointed out . . . .").

> . . . The right of removing aliens, as an incident to the power of war and peacc, according to the theory of the Constitution, belongs to the Government of the United States.[621]

The Report further invoked the duty to protect states from invasion and the Necessary and Proper Clause as authority for the Act.[622]

In the debates, a number of individual supporters offered arguments that relied heavily on sovereignty and referred loosely to a possible enumerated source of the power. Thus, William Gordon of New Hampshire argued that the power involved "[t]he sovereign power of every nation . . . to protect itself,"[623] but Gordon ultimately concluded that this power was implied in "the power of making war, and providing for the general welfare."[624] Samuel Sewall of Massachusetts asserted a somewhat convoluted argument that sovereignty lay in the national government, as established by the Constitution,[625] but he ultimately located the authority in the Commerce and Migration Clauses.[626] Harrison Gray Otis of Massachusetts, a key Federalist leader on the bill, argued broadly that "it was the design of the Federal Constitution to embrace all our exterior relations" and suggested obliquely that the power lay in the common defense.[627] Otis later viewed the legal question as a tension between the sovereign authority of a nation to forbid the entrance of foreigners, which was incidental to the commerce and war powers, and the Migration Clause, which constrained the power to some extent until 1808.[628] The purest inherent powers argument came from Samuel W. Dana of Connecticut, who argued from self-preservation:

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621. Report of the select committee of the House of Representatives, made to the House of Representatives on Feb. 21, 1799, 9 ANNALS OF CONG. 2986 (1799) [hereinafter House Report]. For Gallatin's response, see 9 ANNALS OF CONG. 2994 (1799) ("To admit the first position [that every nation has a power at will to admit and to remove aliens] in its full extent does not destroy the force of the objection; for that objection rests not on a supposition that the power of removing aliens does not exist in the nation; but on the principle that it is not one of those granted by the nation to the General Government . . . .").

622. *Id.*

623. 8 ANNALS OF CONG. 1983–84 (1798).

624. *Id.* at 1984.

625. *Id.* at 1957 ("The Constitution, therefore, he said, in the outset, establishes the sovereignty of the United States, and that sovereignty must reside in the Government of the United States.").

626. *Id.* at 1957–58.

627. *Id.* at 1986 ("If Congress has the right to defend the Union, it has certainly a right to prepare for defense.").

628. *Id.* at 2018. *See also* Debate on the Virginia Resolutions, *reprinted in* THE VIRGINIA REPORT OF 1799–1800, at 31, 100–01 (1850) [hereinafter Debate on the Virginia Resolutions] (statement of William Cowan). "The rights of citizens and aliens," he thought, "had been confounded." He believed their rights were to be measured by, "as to citizens, the Constitution," as to aliens, the law of nations. "Every sovereign nation . . . was possessed of certain rights. Amongst them the right to govern aliens was a perfect right. It vested a power to restrain them." Cowan ultimately located this power in the power to repel invasions and the Necessary and Proper Clause. *See also id.* at 72 (statement of Archibald Magill) (invoking Vattel's view of power over aliens and arguing that "the safety of a nation could not be secured, without such a power . . . being deposited somewhere").

> There is one power, Mr. D. said, inherent and common in every form of Government, which is founded upon any rational principles of policy, which is the power of preserving itself . . . . The question then arises, whether it is not consistent with that power to pass a law for the purposes of removing [aliens] from the country . . . .[629]

In the Virginia Legislature, George Keith Taylor cited Vattel and Blackstone's Commentaries to demonstrate that under the law of nations, states could admit or expel aliens as a matter of grace.[630] Although Taylor appeared to suggest that in the absence of constitutional authority for the power, the international law norm still controlled,[631] he ultimately concluded that the power could be derived from the powers of Congress "to define and punish piracies and felonies committed on the high seas, and *against the law of nations*," and to protect states against invasion, and the Republican Form of Government Clause.[632]

Finally, arguments from necessity in light of the French hostilities played a prominent role in the defense of the Act.[633] In its Answer to the Resolutions, the Massachusetts legislature observed that at the time of the Act's passage, the United States had been "threatened with actual invasion; had been driven, by the unjust and ambitious conduct of the French government, into warlike preparations, expensive and burdensome; and had then, within the bosom of the country, thousands of aliens, who, we doubt not, were ready to cooperate in any external attack."[634] Under such circumstances, the legislature argued, "It cannot be seriously believed that the United States should have waited till the poniard had in fact been

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629. 8 ANNALS OF CONG. 1969–70 (1798). Representative John Wilkes Kittera, of Pennsylvania, similarly argued:

> The power proposed to be exercised by this bill is exercised by every Government upon earth, whether despotic or democratic . . . . It is a right which every man exercises in his own house, by turning out of it, without ceremony, any person whom he thinks dangerous to the peace and welfare of his family. Indeed it was absurd, in the extreme, to be told that the States might exercise this power, but that the United States could not exercise it.

Id. at 2016.

630. Debate on the Virginia Resolutions, *supra* note 628, at 31–32 (statement of George Keith Taylor).

631. *Id.* at 31 ("If there were nothing then, he said, in the Constitution of the United States, respecting the migration of persons, the doctrine of the law of nations which he had read, was sound, and the general government might by that lawfully restrain or regulate the entry of aliens, and order them away if necessary.").

632. *Id.* at 32–33.

633. The House Report noted that "though the United States, at the time of passing this act, were not in a state of declared war, they were in a state of partial hostility, and had power, by law, to provide . . . for removing dangerous aliens." House Report, *supra* note 621, at 2987.

634. Answer of the States—Massachusetts, adopted Feb. 13, 1799, 4 ELLIOT'S DEBATES, *supra* note 572, at 535, *cited in* Brief for Appellant at 48–49, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (No. 1446).

plunged."[635] In contrast to invocations of necessity later in the century, however, necessity generally was used to support broad interpretations of the enumerated clauses. The House Report accordingly argued that the power must not be prohibited by the Migration Clause, since the measure was a necessary expedient, and any *necessary* powers not held by the State governments under the Constitution must be possessed by the national government. Since the Constitution gave no power to the *states* to remove aliens, the national government must have the power. Otherwise, "there would be no authority in the country empowered to send away dangerous aliens, which cannot be admitted."[636]

Thus, despite some loose rhetoric regarding the powers of the national government, supporters of the Alien Act primarily concentrated their arguments on the presence or absence of an enumerated federal power to expel aliens, and the majority of the debate concerned the meaning and import of various clauses of the Constitution.[637] The debates demonstrated both the supporters' determination to find enumerated support for the power and the difficulty the express clauses posed for this search.

If the Alien Act debates provided little basis for the contention that the government possessed an inherent, extraconstitutional source of authority over aliens, however, supporters did clearly articulate the view that aliens lacked recourse to the Constitution's affirmative protections.[638] One central

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635. 4 ELLIOT'S DEBATES, *supra* note 572, at 535; House Report, *supra* note 621, at 2987.

636. House Report, *supra* note 621, at 2987. *See also* 8 ANNALS OF CONG. 1985 (1798) (statement of Rep. William Gordon of New Hampshire) ("If no law of this kind was passed, it would be in the power of an individual State to introduce such a number of aliens into the country, as might not only be dangerous, but as might be sufficient to overturn the Government, and introduce the greatest confusion in the country . . . . To suppose [that the General Government is so deficient in power] would be to suppose that the very existence of the Union is in the power of a single State."); Debate on the Virginia Resolutions, *supra* note 628, at 32 (statement of George Keith Taylor) ("If the general government . . . possessed not the power of removal, one great mischief of a general nature, which it was intended to remedy, would remain as before.").

637. Supporters of the Act relied primarily on the war power and the Common Defence and General Welfare clauses, as discussed above. Supporters also relied on the Republican Government, Commerce, and Migration Clauses. *See, e.g.*, 8 ANNALS OF CONG. 1965–66 (1798) (statement of Rep. James Asheton Bayard of Delaware); *id.* at 1991 (statement of Rep. Robert Goodloe Harper of South Carolina); *id.* at 1994 (statement of Rep. Jonathan Dayton of New Jersey); Answer of the States—Massachusetts, 4 ELLIOT'S DEBATES, *supra* note 572, at 534–35.

638. Opponents argued that the Act could not be justified under any enumerated power. *See, e.g.*, Madison's Report, *supra* note 572, at 546; Virginia Resolution of 1798, 4 ELLIOT'S DEBATES, *supra* note 572, at 528; Kentucky Resolution of 1798, 4 ELLIOT'S DEBATES, *supra* note 572, at 541. They also argued that even if such a power could be found, the Act violated express provisions of the Constitution. Opponents argued primarily that the Act expressly violated the Migration Clause's prohibition of federal regulation of migration prior to 1808, *e.g.*, Kentucky Resolution of 1798, *supra*, and the Habeas Corpus, Due Process, and Jury Trial Clauses. *See, e.g.*, 8 ANNALS OF CONG. 1955–57 (1798) (statement of Rep. Albert Gallatin of Pennsylvania); Kentucky Resolution, *supra*, at 541–42 (arguing that the Act violated due process and the Sixth Amendment). Finally, opponents argued that the enormous discretionary power the Act granted to the Executive violated the Constitution's careful separation of powers and the Article III command that the judicial power should be vested in the courts. *See, e.g.*, 8 ANNALS OF CONG. 1954–57 (1798) (statement of Albert

contention of Jeffersonian opponents of the Act was that it violated various individual rights protections. In response, having established that the power to expel derived from some constitutional source, Hamiltonian Federalists argued from social contract theory that the Constitution imposed no limits on the exercise of the power, since aliens were not parties to that document. As the House Report on the Alien Act stated,

> the Constitution was made for citizens, not for aliens, who of consequence have no rights under it, but remain in the country and enjoy the benefits of the laws, not as a matter of right, but merely as a matter of favor and permission, which . . . may be withdrawn whenever the Government charged with the general welfare shall judge their further continuance dangerous.[639]

"The citizen," the House Report observed, "being a member of the society," could not be disenfranchised other than following conviction by a jury trial. Aliens, however, could be removed "merely . . . from motives" of policy or security.[640] Their removal was not a punishment, but the withdrawal "of an indulgence . . . which we are in no manner bound to grant or continue."[641] Otis of Massachusetts likewise contended that "upon reading the Constitution, [one] found that 'we the people of the United States,' were the only parties concerned in making that instrument. He found nothing in it

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Gallatin); 9 ANNALS OF CONG. 2993–3002 (1799) (statement of Albert Gallatin); Madison's Report, *supra*, at 559–60.

639. House Report, *supra* note 621, at 2987. *See also* Answer of the States—Massachusetts, 4 ELLIOT'S DEBATES, *supra* note 572, at 534–35 (arguing that the Alien Act applied to "a description of persons whose rights were not particularly contemplated in the Constitution of the United States, who are entitled only to a temporary protection while they yield a temporary allegiance—a protection which ought to be withdrawn whenever they become 'dangerous' . . . or . . . 'treasonable'"); Answer to the Resolutions of the State of Kentucky, Oct. 29, 1799, *in* 4 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 525, 528 (1876) (stating that "we never conjectured that aliens were any party to the federal compact; we never knew that aliens had any rights among us, except what they derived from the law of nations, and rights of hospitality"); Debate on the Virginia Resolutions, *supra* note 628, at 34 (statement of George Keith Taylor) (arguing that the right to jury trial was not violated because "aliens were not a party to the compact" and only enjoyed rights under natural law); *id.* at 73 (statement of Archibald Magill); *id.* at 102 (statement of William Cowan) ("Aliens were entitled to their privileges from a principle of the law of nations, and not under the Constitution." An interpretation that aliens were "persons" for purposes of the Constitution might establish that "an Indian or a Negro" was equally entitled, "[b]ut none of these were parties to the Constitution."); ADDRESS OF THE MINORITY IN THE VIRGINIA LEGISLATURE TO THE PEOPLE OF THAT STATE; CONTAINING A VINDICATION OF THE CONSTITUTIONALITY OF THE ALIEN AND SEDITION LAWS 9–10, *microformed on* AMERICAN ANTIQUARIAN SOCIETY, EARLY AMERICAN IMPRINTS 1639–1800 (Evans No. 36635) (arguing that "the right of remaining in our country is vested in no alien; he enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn").

640. House Report, *supra* note 621, at 2987.

641. *Id. See also* Debate on the Virginia Resolutions, *supra* note 628, at 100–01 (statement of William Cowan) ("The rights of citizens and aliens, he thought, had been confounded."). Cowan believed their rights were to be measured "as to citizens, [by] the Constitution, as to aliens, [by] the law of nations." *Id.*

which bound us to fraternize with the whole world."[642] Accordingly, if an enumerated source of authority could be found, the Constitution's express individual rights clauses would not stymie the exercise of that power.

In an approach that directly foreshadowed the analysis in *Curtiss-Wright*, Pennsylvania state court judge Alexander Addison combined social contract and territoriality principles to argue that the restrictions of the Constitution applied only to domestic affairs. "The restrictions of the constitution," he argued, were "not restrictions of external and national right, but of internal and municipal right." Because aliens were not "parties and subjects to the constitution," but foreign subjects, authority over them was "to be measured . . . [only] by external . . . law."[643]

Jefferson and Madison, who ghost-authored the Kentucky and Virginia Resolutions, and their followers disagreed with the supporters' interpretation of international law regarding aliens, the enumerated powers doctrine, and the protection aliens enjoyed under the Constitution. In his 1800 Report to the Virginia Legislature, which summarized and elaborated on the arguments in the Virginia and Kentucky Resolutions from the year before, Madison challenged the assumption that the power to expel friendly aliens was consistent with international law. The law of nations, he contended, authorized only the expulsion of alien enemies, not alien friends.[644] "Alien enemies are under the law of nations, and liable to be punished for offen[s]es against it. Alien friends . . . are under the municipal law, and must be tried and punished according to that law only."[645] Even if the *admission* of friendly aliens was a matter of discretion under international law, he argued, once admitted to the country, the grant could not be rescinded. Like a grant of land, a

642. 8 ANNALS OF CONG. 2018 (1798) (remarks of Rep. Harrison Gray Otis of Massachusetts); *see also id.* at 1984–85 (remarks of Rep. William Gordon of New Hampshire) (arguing that the Constitution was not formed for the use and benefit of aliens); Debate on the Virginia Resolutions, *supra* note 628, at 34 (statement of George Keith Taylor) (arguing that "aliens not being a party to the compact, were not bound by it to the performance of any particular *duty*, nor did it confer upon them any *rights*"); *id.* at 105 (statement of Henry Lee) ("It was wonderfully kind, he said, in our fathers to devote their time and money to the care of the Turk, Gaul, and Indian, when the proper object was that of their children.").

643. ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY (1800), *reprinted in* 2 CHARLES S. HYNEMAN & DONALD S. LUTZ, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 1070 (1983). For further discussion of Addison's defense of the Alien Act, see NEUMAN, *supra* note 54, at 55–56.

644. Madison argued:

> [T]he general practice of nations distinguishes between alien friends and alien enemies. The latter it has proceeded against, according to the law of nations, by expelling them as enemies. The former it has considered as under a local and temporary allegiance, and entitled to a correspondent protection. If contrary instances are to be found in barbarous countries, under undefined prerogatives, or amid revolutionary dangers, they will not be deemed fit precedents for the government of the United States, even if not beyond its constitutional authority.

Madison's Report, *supra* note 572, at 557. The Report was adopted by the Virginia Legislature in 1800. 4 ELLIOT'S DEBATES, *supra* note 572, at 546.

645. Madison's Report, *supra* note 572, at 556.

pardon, or a naturalization decision, the original bestowal may have been discretionary, but could not be revoked without good reason.[646]

If supporters of the Act attempted to fit the expulsion of friendly aliens into the constitutional framework, its opponents characterized the Act as relying on extraconstitutional powers. Even if international law *did* authorize the expulsion of friendly aliens, opponents contended, that fact did not overcome the limitations of the enumerated powers doctrine.[647] Madison emphasized that the Constitution did not give the national government and the states all the powers enjoyed by other sovereign nations. International law might inform the meaning of constitutional provisions, such as the war power.[648] But powers authorized by international law were both distributed and limited by the Constitution. "There are powers exercised by most other governments," Madison noted, "which, in the United States, are withheld by the people both from the general government *and* from the state governments."[649] John Taylor of Virginia objected strenuously to the suggestion that either sovereignty or international law should expand the powers of the national government:

> This doctrine of the rights of sovereignty was as dangerous as false. Dangerous, because its extent could be never forseen; false, as violating the idea of limiting a government by constitutional rules. From this unlimited source, the British Parliament derives its claim of unlimited power. King, lords and commons, because sovereign, may do everything. If it was admitted here, . . . it not only would absorb the . . . [powers] arising from the laws of nations, but also the royal prerogatives, and whatever else it bestows upon the British Parliament. Such a sovereignty would speedily swallow up the state governments, consolidate the Union, and terminate in monarchy.[650]

As Taylor put it, the federal government possessed solely enumerated powers; it could not "at pleasure dip [its] hands into the inexhaustible treasuries of the . . . law of nations."[651] Gallatin equally objected to the suggestion that necessity could justify the power.[652]

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646. *Id.* ("[I]t cannot be a true inferenee, that, because the admission of an alien is a favor, the favor may be revoked at pleasure.").

647. *See, e.g.*, Debate on the Virginia Resolutions, *supra* note 628, at 68–69 (statement of James Barbour) (noting that Vattel recognizcd that the rights of aliens were governed by both international and domcstic law).

648. *Cf.* 8 ANNALS OF CONG. 1980 (1798) (statement of Rep. Albert Gallatin of Pennsylvania) ("By virtue of that [war] power, and in order to carry it into effect, Congress could dispose of the persons and property of alien enemies as it sces fit, *provided it be according to the laws of nations and to treaties.*") (emphasis added).

649. 4 ELLIOT'S DEBATES, *supra* note 572, at 559.

650. Debate on the Virginia Resolutions, *supra* note 628, at 118 (statement of John Taylor).

651. *Id.* at 115–16 (statement of John Taylor); JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 279–89 (Da Capo Press 1970) (1820).

652. According to Gallatin:

Accordingly, while the national government had power under the Constitution's war powers to expel enemy aliens during hostilities, no similar power existed to expel friendly aliens who had been admitted to reside in the United States.[653] The Act thus was "void, and of no force."[654]

Madison also accused the Federalists of inverting the enumerated powers doctrine. The assumption, he wrote, "that the powers supposed to be necessary, which are not so given to the state governments, must reside in this government of the United States,"[655] was inapplicable to the United States, whose powers were cautiously "delegated and defined."[656] Indeed, the Federalists' assertion of this view was so "new" and "extraordinary" as to strike "radically at the political system of America."[657]

Finally, the Act's opponents rejected the suggestion that the Constitution did not protect aliens. The mere fact that aliens were not parties to the Constitution, Madison argued, did not establish that Congress had absolute power over them, since "[t]he parties to the Constitution may have granted, or retained, or modified, the [international law] power over aliens, without regard to that particular consideration."[658] The determining factor was the Constitution's text, which spoke of the rights of "persons" and constraints on governmental action, and did not limit its protections to citizens.[659] The Act thus violated the constitutional rights of aliens to habeas

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> [The supposition] that there must exist certain general powers in Congress which are equal to meet any possible case . . . is contrary to the Constitution, for that has put limits to the powers of the Government, and has said certain things shall not be done by it. For instance, it might be thought necessary, though neither an invasion nor a rebellion had taken place, to suspend the Habeas Corpus Act . . . . But the Constitution would be directly against such a motion. . . . So that this Government cannot do everything which the gentleman may suppose necessary to be done.

8 ANNALS OF CONG. 1977 (1798) (statement of Rep. Albert Gallatin of Pennsylvania); *see also id.* at 1969 (statement of Albert Gallatin) ("There are other mischiefs which might be done, against which the Federal Constitution makes no provision. Persons might burn our towns and slay our inhabitants. But our Constitution goes upon an idea that there are State Governments who divide the powers of Government with the Federal Government.").

653. Madison's Report, *supra* note 572, at 554.

654. Kentucky Resolution of 1798 and 1799, 4 ELLIOT'S DEBATES, *supra* note 572, at 541. *See also* Virginia Resolution of 1798, 4 ELLIOT'S DEBATES, *supra* note 572, at 528 (maintaining that the Alien Act "exercises a power . . . [nowhere] delegated" to the federal government).

655. Madison's Report, *supra* note 572, at 559.

656. *Id.*

657. *Id.* at 558.

658. *Id.* at 556.

659. Albert Gallatin, who led Jeffersonian Republicans in the House, for example, noted that the Habeas and Due Process Clauses, and the right to jury trial, all applicd to persons, not "citizens." 8 ANNALS OF CONG. 1956 (1798) (discussing habeas and due process); *id.* at 1981 (discussing the right to jury trial). *See also* Debate on the Virginia Resolutions, *supra* note 628, at 24–25 (statement of John Taylor) (arguing that the "Constitution literally reached aliens, by using in all places the term 'persons,' not 'natives'"). In the Virginia Debates, John Allen contended that, under the law of nations, aliens could not be deprived of life, liberty, or property without a trial by jury. *Id.* at 53.

corpus, due process, and a jury trial.[660] In the House debate, Edward Livingston of Virginia offered an eloquent reply to the Federalists' social contract argument:

> [W]e are told that the Constitutional compact was made between citizens only, and that, therefore, its provisions were not intended to extend to aliens, and that this acting only on them, is, therefore, not forbidden by the Constitution. But, unfortunately, . . . the Constitution expressly excludes any idea of this distinction; it speaks of all 'judicial power,' 'all trials for crimes,' all 'criminal prosecutions,' all 'persons accused.' No distinction between citizen and alien, between high or low, friends or opposers to the Exeeutive power, republican and royalist. All are entitled to the same equal distribution of justice, to the same humane provision to protect their innocence; all are liable to the same punishment that awaits their guilt.[661]

Opponents of the Act also disputed the logical consequences of the Federalists' social contract approach. As Madison put it:

> [A] more direct reply is, that it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection . . . . [A]s they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.[662]

Thus, the national government did not enjoy any greater powers over friendly aliens than it did over citizens.

In sum, supporters of the Act contended that international law authorized the expulsion of friendly aliens, and argued from necessity that the national government must have the power to expel aliens, as one held by all sovereign states. They generally sought to locate this sovereign authority in some enumerated power, though some Federalist supporters relied directly on an inherent powers argument. Supporters also contended that aliens, as outsiders to the social contract, could not invoke the Constitution's protections. Conversely, opponents of the Act denied that international law authorized the expulsion of aliens and argued that the Constitution did not bestow full international law authority over aliens on the national government. National power over aliens must be determined from the Constitution's provisions, according to ordinary enumerated powers analysis. Finally, opponents maintained that the Constitution's text clearly included

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660. *See supra* note 638.

661. 8 ANNALS OF CONG. 2012 (1798) (statement of Rep. Edward Livingston of New York).

662. Madison's Report, *supra* note 572, at 556. *See also* 8 ANNALS OF CONG. 2012 (1798) (statement of Edward Livingston) ("It is an acknowledged principle . . . that alien friends, . . . residing among us, are entitled to the protection of our laws, and that during their residence, they owe a temporary allegiance to our Government. If they are accused of violating this allegiance, the same laws which interpose in the case of a citizen must determine the truth of the accusation, and if found guilty they are liable to the same punishment.").

aliens in its protections. The Alien Act expired in 1800 of its own terms, without judicial resolution of these issues. Although John Adams signed expulsion orders for several aliens under the Act, the targeted individuals either evaded arrest or left the country of their own accord.[663] The Act became notorious, and by 1832, Vice President John C. Calhoun asserted that the unconstitutionality of the Alien and Sedition laws was "settled."[664] Justice Story gave no opinion regarding the Act's legality in his *Commentaries*, predicting that the Act was "not likely to be renewed" and had "left no permanent traces in the constitutional jurisprudence of the country."[665]

C. Immigration and Slavery

The 1798 and 1799 debates over federal control of aliens occurred against a backdrop of political concerns about the power of Federalists to expel Jeffersonian aliens, as well as concerns about the power of states to control the entry of undesirable aliens—including slaves and free blacks—into their territories. Southern states feared that free blacks from the North and the West Indies would provoke dissension and revolt among the slaves in their territories—a fear that was exacerbated by the successful Haitian slave revolt in 1802. Southern states eventually adopted legislation excluding free blacks. In coastal states, these laws included restrictions on the movement of black seamen in port, generally providing for their imprisonment during the period the ship was in port.[666] Because free blacks were citizens in some northern states, slaveholding states felt that they could maintain the right to exclude free blacks only by asserting the power to exclude all persons deemed dangerous or injurious to their interests.[667] Pro-slavery and states' rights advocates thus viewed regulation of immigration as intimately related to state police powers.

Federal activity in the immigration area was minimal during the pre-Civil War period. The federal government's express policy was to encourage settlement in the new nation, and naturalization was extended to free white

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663. NEUMAN, *supra* note 54, at 60.

664. Letter of Aug. 28, 1832 from Vice President Calhoun to Governor Hamilton, *quoted in* 2 STORY, *supra* note 288, bk. III, ch. XXVII, § 1294, at 174 n.1. In his edition of Story's *Commentaries*, Judge Cooley disagreed with Calhoun's view that the Act's unconstitutionality had been established. *Id.* at 175 n.1 ("The Alien and Sedition acts were, beyond all question, condemned by public sentiment, but that the condemnation, . . . is placed on the ground of want of constitutional power is by no means clear.").

665. STORY, *supra* note 288, bk. III, ch. XXVII, §§ 648–49, at 464–65.

666. Philip M. Hamer, *British Consuls and the Negro Seamen Acts, 1850–1860*, 1 J.S. HIST. 138, 138 (1935); Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1848*, I J.S. HIST. 33–34 (1935).

667. For further discussion of the relationship of slavery and immigration, see NEUMAN, *supra* note 54, at 35–40.

residents.[668] Federal legislation was adopted to ensure the health and safety of passengers and to grant duty-free admission to their personal and professional possessions.[669] No meaningful federal restrictions on immigration were imposed.

The slavery question cast a long shadow over arguments regarding the nature and location of the immigration power in the pre-Civil War period. Within this debate, inherent powers arguments were asserted by the states, who contended that the power to exclude aliens was possessed by the states as the original sovereigns. Proponents of a national immigration power, on the other hand, sought to locate the power in the enumerated federal clauses, particularly the Commerce Clause.

D. The Antebellum Era: Commerce v. Police

Although little noted in the debates over the 1798 Alien Act, the foreign commerce power early emerged as a leading contender for the constitutional source of an enumerated federal power over immigration. Immigration quickly became equated with the commerce power, due in part to the fact that many early immigrants to the United States came as indentured workers and slaves.[670] As Stephen Legomsky pointed out in his important work tracing the evolution of the plenary power doctrine, in *Gibbons v. Ogden*[671] the

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668. Naturalization Act, ch. 3, 1 Stat. 103, 103–04 (1790) (repealed 1795). The 1790 act allowed any free, white alien who had resided in the United States for two years to naturalize. The residence requirement was increased to five years in 1795, to fourteen years in 1798, and modified again in 1802. The "whites only" naturalization rule remained in place until 1870, when naturalization was extended to aliens of African decent, but not to the Chinese. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256. OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 300 nn.8–9 (1993).

669. In 1799, Congress enacted legislation requiring ship captains arriving from foreign ports to provide manifests identifying passengers and their cargo and admitting the personal baggage and trade tools of persons arriving in the United States duty-free. Federal Revenue Act of 1799, ch. 22, §§ 23, 30, 46, 1 Stat. 627, 644–45, 649, 661. An Act of April 27, 1816, continued exempting personal baggage from duty, regulated passenger capacity and conditions for ships arriving from foreign ports, and required that passenger manifests be provided to Congress. Act of Apr. 27, 1816, ch. 107, § 2, 3 Stat. 310, 313. Two statutes from the 1840s provided duty-free entry for the personal and professional effects of arriving passengers. Act of Aug. 30, 1842, ch. 270, § 9, 5 Stat. 548, 560 (continuing duty-free entry of clothing, personal effects, professional books, and trade tools of arriving passengers); Act of July 30, 1846, ch. 74, 9 Stat. 42, 49 (extending duty-free entry to household effects of "persons or families from foreign countries"). *See* The Passenger Cases, 48 U.S. (7 How.) 283, 441–42 (1849) (Catron, J., concurring); Astor v. Merrit, 111 U.S. 202, 210–11 (1884) (discussing statutes).

670. *See* Mary S. Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 761 (1996) ("[T]he transportation of indentured servants was generally perceived as a commerce of 'imported' persons."). A number of international law commentators also had viewed authority over immigration as part of commerce. *See supra* Part IV(A).

671. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). *See* LEGOMSKY, *supra* note 51, at 181 (noting the origins of the concept of immigration as a plenary power in *Gibbons*).

Supreme Court generally recognized that the commerce power included the transportation of persons.[672] "Vessels," said the Chief Justice, "have always been employed . . . in the transportation of passengers . . . . Yet it has never been suspected that the general laws of navigation did not apply to them."[673] Marshall portrayed commerce as a plenary congressional power:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution . . . . [T]he sovereignty of Congress . . . is plenary as to those objects . . . .[674]

Marshall's reference to plenary power, of course, meant a power exclusively held by the national government and not shared with the states, but one which was nevertheless limited by the Constitution.

1. New York v. Miln.—The portrayals of commerce as encompassing immigration and as an exclusive federal power were both hotly contested in the 1827 immigration case of *New York v. Miln*.[675] *Miln* addressed the constitutionality of a New York statute requiring ship captains to identify all foreign passengers brought into the Port of New York.[676] The case considered whether the reporting requirement could be sustained as an exercise of the state police power or whether it was barred by an exclusive national power.

At the time of the Supreme Court argument in the case, New York was receiving 60,500 immigrants annually,[677] and New York argued that it should not be required to bear the cost of the Western states' demand for "emigrati" by supporting those who entered and became a burden on the city.[678] New York defended the statute on the grounds either that the statute was an exercise of the police power protected by the Tenth Amendment, or that the legislation was not barred by the commerce power because Congress had not legislated in the area.[679] Counsel for New York stressed repeatedly that invalidating the law would require the invalidation of a wide range of state

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672. *Gibbons*, 22 U.S. at 215 (finding "no clear distinction . . . between the power to regulate vessels employed in transporting men for hire, and property for hire").

673. *Id.* at 217.

674. *Id.* at 196–97. Counsel had argued to the Court that the commerce power was a sovereign plenary power shared between Congress and the states: "The power, considered in itself, is supreme, unlimited, and plenary. No part of any sovereign power can be annihilated. Whatever portion, then, of this power, was not granted to Congress, remains in the States." *Id.* at 46.

675. 36 U.S. (11 Pet.) 102 (1837).

676. On February 11, 1824, the New York legislature passed "[a]n act concerning passengers in vessels arriving in the port of New York." Seetion one of the statute imposed a $75 fine for every passenger not properly reported. The defendant ship eaptain had failed to provide the passenger report, and New York sued to recover the penalties owed under the act. *Id.* at 104–05.

677. *Id.* at 106 (argument for plaintiff).

678. *Id.* at 114 (argument for plaintiff).

679. *Id.* at 107–08 (argument for plaintiff).

laws affecting commerce, including the negro seamen laws of southern states.[680]

The Federalists in the debates over the Alien Act had invoked inherent sovereign powers to support *federal* authority over immigration, but New York now asserted sovereign powers in support of a *state* immigration power. Thus, New York argued, the "power of determining how and when strangers are to be admitted, is inherent in all communities."[681] This power was a "high sovereign power" which "belonged to the states, before the adoption of the federal Constitution."[682] It was given only secondarily to the national government as an incident to the war, treaty, and commerce powers.[683] By contrast, the defendant ship captain argued that the New York legislation regulated foreign commerce and that, under *Gibbons*, Congress had exclusive power in this area.[684] Counsel for the defendant argued that the New York statute could entirely bar immigration into the country, and that if the evils of immigration cited by New York actually existed, Congress could pass a law remedying them.[685]

Miln was highly contentious, due both to the Court's uncertainty regarding the scope of the commerce power and to the possible implications of the case for state regulation of slavery.[686] The resulting six-to-one decision upheld the New York reporting requirement under the police power in a variety of opinions, with Justice Story dissenting. Both Justice Barbour's "opinion of the Court"[687] and Justice Baldwin's concurrence embraced New York's theory of state inherent powers. Barbour noted that "[t]he power . . . of New York to pass this law . . . undeniably existed at the formation of the Constitution,"[688] and cited Vattel for the proposition that "[t]he sovereign may forbid the entrance of his territory, either to foreigners in general, or in partieular cases, . . . according as he may think it advantageous to the state."[689] In the most eontroversial part of his opinion

680. *Id.* at 109–12, 115 (argument for plaintiff).

681. *Id.* at 110 (argument for plaintiff).

682. *Id.* (argument for plaintiff).

683. *Id.* at 111 (argument for plaintiff).

684. *Id.* at 116–17 (argument for defendant).

685. *Id.* at 116 (argument for defendant).

686. The case was argued before Chief Justice Marshall, and then set over for re-argument after Marshall left the Court, due to disagreement on the issues among the Justices. *Id.* at 106.

687. Barbour described the opinion as that of the Court, *id.* at 130, though as Justice Wayne later noted, the reasoning did not clearly enjoy a majority. *See* The Passenger Cases, 48 U.S. (7 How.) 283, 429–36 (1849) (Wayne, J., concurring) (discussing the Court's disagreement regarding the *Miln* decision).

688. *Miln*, 36 U.S. at 132.

689. *Id.*

for future immigration cases, Barbour held that the commerce power did not include the regulation of persons.[690]

Justice Baldwin's lengthy concurring opinion articulated the extreme states' rights position on the Court. Baldwin viewed the power as one which was inherent in the states and had not been withheld from them by the Constitution. Thus to Baldwin, "the sovereignty of the states over [this subject], not having been abridged, impaired or altered by the constitution, is as perfect as if it had not been adopted."[691] Baldwin emphasized that the power at issue was one of police power, and that such laws were passed "in virtue of an original inherent right in the people of each state," which "remains in them in full and unimpaired sovereignty, as absolutely as their soil."[692] The power to exclude undesirable individuals was an exercise of

> the highest and most sovereign jurisdiction, indispensable to the separate existence of a state; it [is] a power vested by original inherent right, existing before the constitution, remaining in its plenitude, incapable of any abridgment by any of its provisions.[693]

Baldwin denied that the national government had any power to regulate paupers, or that such regulation could in any way be considered commerce.[694] The national government could only exercise enumerated powers, while under the Tenth Amendment states retained original powers not granted to the United States or withheld from the states.[695]

Justice Story dissented on the grounds that the statute regulated interstate and foreign commerce and that these powers had been dedicated exclusively to Congress. Story felt that *Gibbons* had expressly held that the transport of passengers constituted commerce[696] and observed that, if the same act had been passed by Congress, it would have been upheld.[697]

In short, the *Miln* Court recognized a narrow state police power over entry of aliens, as required by the southern states, while avoiding any pronouncement on the scope or exclusivity of the federal commerce power. Justice Barbour's putative opinion for the Court, and Baldwin's concurrence,

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690. *Id.* at 136–37 ("But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce."). This finding so distressed Justice Wayne that he later argued, in a highly unusual concurrence in the *Passenger Cases*, that Barbour's assertion that "persons are not subjects of commerce" did not enjoy the support of the *Miln* majority. *See* The Passenger Cases, 48 U.S. (7 How.) 283, 430–32 (Wayne, J., concurring); *but see id.* at 487–89 (Taney, C.J.) (disputing Justice Wayne's position).

691. *Miln*, 36 U.S. at 153 (Baldwin, J., concurring).

692. *Id.* (Baldwin, J., concurring).

693. *Id.* (Baldwin, J., concurring).

694. *Id.* (Baldwin, J., concurring).

695. *Id.* (Baldwin, J., concurring).

696. *Id.* at 155 (Story, J., dissenting).

697. *Id.* at 157 (Story, J., dissenting).

portrayed control over undesirable aliens as an inherent sovereign power of the states.

2. The Passenger Cases.—The next major immigration challenge to come to the Supreme Court arose in the 1849 *Passenger Cases*, which involved Massachusetts and New York laws taxing arriving foreign passengers.[698] Ship masters challenged the constitutionality of the head taxes in both cases. By a narrow five-to-four vote, with no majority opinion and voluminous concurrences, the Supreme Court invalidated the state legislation. The cases again revealed bitter disagreements among the Justices over whether the state laws could be considered an exercise of the police power, whether the importation of passengers constituted commerce, and whether the commerce power was exclusive in the national government. By 1849, slavery had become an extremely divisive issue in national politics.[699] The dissenters openly decried the decision's implications for the slave-holding states,[700] while the members of the majority avoided the issue, either by denying that slavery involved commerce or by recognizing a state police power to regulate entry by slaves and free blacks.[701]

The members of the majority found that the state laws infringed on powers that were dedicated to the national government, either through the Commerce, Taxation, Naturalization, or Migration Clauses.[702] The majority agreed that whether or not the commerce power was exclusive, Congress had occupied the field with legislation encouraging free immigration.[703] Several

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698. The Passenger Cases, 48 U.S. (7 How.) 283 (1849).

699. The decisions in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841) (considering the right of a state to prohibit bringing slaves into its territory for sale), and *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (upholding the constitutionality of the Fugitive Slave Act), had exacerbated the tension between recognizing a state power over slavery and a federal immigration power. The arguments and opinions in *Groves* addressed the *Miln* decision at length. *See, e.g.*, *Groves*, 40 U.S. at 467 (argument of appellants); *id.* at 488–89 (argument of appellee); *id.* at 506–07 (McLean, J.) (arguing that slaves, as persons, do not fall under the commerce power); *id.* at 509–10 (Taney, C.J.) (suggesting that whether the federal commerce power is exclusive is an open question); *id.* at 513–15 (Baldwin, J.) (stating that slaves are property, not commerce). *Groves* and *Prigg*, in turn, were considered extensively in the *Passenger Cases*.

700. *See, e.g.*, The Passenger Cases, 48 U.S. at 474, 477 (Taney, C.J., dissenting); *id.* at 508 (Daniel, J., dissenting); *id.* at 542, 567 (Woodbury, J., dissenting) (all warning that giving Congress power over immigrants as objects of commerce would strip the states of their power to regulate slaves and the slave trade).

701. *See, e.g.*, *id.* at 406 (McLean, J., concurring); *id.* at 426, 428 (Wayne, J., concurring); *id.* at 457 (Grier, J., concurring) (all asserting that the federal government's power over immigration does not affect the states' power to exclude blacks).

702. *See, e.g.*, *id.* at 408 (McLean, J., concurring) (arguing that passengers are the subjects of commerce and that Congress has exclusive power to regulate them); *id.* at 426 (Wayne, J., concurring) (arguing that the state immigration laws are inconsistent with the Naturalization Clause).

703. *See, e.g.*, *id.* at 461 (Grier, J., concurring) ("It is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our borders, and to convert these waste lands into productive farms, and thus add to the wealth,

Justices stressed that immigration was necessarily a matter of national rather than local concern and that allowing the few state ports of entry to constrain migration to other parts of the country would make the interior states "tributary to" Boston and New York.[704]

Justice Wayne was the only member of the majority who discussed the immigration power in terms of inherent sovereignty, and he viewed the Commerce Clause as incorporating this power. Citing Martens's international law treatise, Justice Wayne observed that every nation had a natural right, through commerce, "to exercise freely its sovereign power over the foreigners living in its territories" and to make any distinctions between nations that it wishes.[705] In Justice Wayne's view, police powers were indistinguishable from powers of sovereignty and included the right of nations to restrain entry of foreigners.[706] Justice Wayne agreed that States retained the sovereign powers necessary to their internal governance.[707] States did not, however, retain the power at issue in the *Passenger Cases*, since that had been dedicated to the national government.[708]

While the majority emphasized the beneficial effects of immigration, Chief Justice Taney's lengthy dissent was riddled with invective about aliens akin to his portrayal of Indians in *Rogers*[709] and of blacks in *Dred Scott*.[710] Taney warned of "pauperism," "pestilence,"[711] and "vice,"[712] and portrayed

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population, and power of the nation."); *id.* at 440–42 (Catron, J., concurring) (concluding that "Congress has covered and has intended to cover, the whole field of legislation over this branch of commerce"). *See also supra* note 669 (discussing federal legislation).

704. *Id.* at 461 (Grier, J., concurring).

705. *Id.* at 416 (Wayne, J., concurring) (quoting G.F. MARTENS, SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE (William Cobbett trans.) (1795)); *see also id.* at 421 (stating that "among the restraints which nations may impose upon the liberty or freedom of commerce [are] those which may be put upon foreigners coming into or residing within their territories"); *id.* at 423 ("Nations have a right to keep at a distance all suspected persons; to forbid the entry of foreigners or foreign merchandise of a certain description, as circumstances may require.").

706. *Id.* at 423–24 (Wayne, J., concurring).

707. *Id.* at 424 (Wayne, J., concurring); *see also id.* at 425 (noting that states had a right to be informed of the names of arriving foreigners, as in *Miln*, and "to turn off from their territories paupers, vagabonds, and fugitives from justice").

708. *Id.* at 427 (Wayne, J., concurring) (maintaining that "the constitutional obligations . . . in respect to commerce and navigation and naturalization, have qualified the original discretion of the States as to who shall come and live in the United States"); *see also id.* at 425–26 (Wayne, J., concurring) ("Having surrendered to the United States the sovereign police power over commerce, . . . it is necessarily a part of the power of the United States to determine who shall come to and reside in the United States for the purposes of trade, independently of every other condition of admittance which the States may attempt to impose upon such persons.").

709. United States v. Rogers, 45 U.S. (4 How.) 567, 571 (1846); *see supra* notes 262–81 and accompanying text.

710. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857); *see infra* notes 1305–28 and accompanying text.

711. *The Passenger Cases*, 48 U.S. at 490 (Taney, C.J., dissenting).

712. *Id.* at 472 (Taney, C.J., dissenting).

European immigrants as "strangers" who were dangerous, "indigent and infirm,"[713] "tainted with crimes or infectious diseases,"[714] "the needy and the wretched" and an "immense mass of poverty and helplessness,"[715] who "constantly subject[ed the citizenry] to the danger of infectious diseases."[716] The laws were designed to protect the states from "the burdens and evils of foreign paupers" and "against the introduction of contagious diseases."[717]

The dissenters[718] argued generally that immigration was a matter of local rather than national concern, which had been reserved to the states, and denied that any constitutional provision authorized Congress to force unwanted foreigners upon the states.[719] The dissenting Justices offered a number of arguments that later would be embraced by the Court in support of an inherent national immigration power. All the dissenters stressed the power as essential to self-defense.[720] Chief Justice Taney, for example, argued that the laws were authorized by the states' "power of self-preservation,"[721] which "must be paramount and absolute in the sovereignty that possesses it."[722] Both Justices Daniel and Woodbury invoked the debates over the Alien Act to support their argument that Congress lacked power to regulate the admission of friendly aliens.[723] Justice Woodbury cited Vattel and other scholars to conclude that the power to exclude immigrants existed in all sovereign states.[724] Woodbury also emphasized state control over membership and identity, arguing that the laws rested on the "sovereign right [of a state] to regulate who shall be her inhabitants."[725] He asserted that even if the law could not be justified as a police measure, it "results from the power

713. *Id.* at 485 (Taney, C.J., dissenting).

714. *Id.* at 476–77 (Taney, C.J., dissenting).

715. *Id.* at 490 (Taney, C.J., dissenting).

716. *Id.* at 485 (Taney, C.J., dissenting).

717. *Id.* at 483 (Taney, C.J., dissenting).

718. Chief Justice Taney and Justices Nelson, Daniel, and Woodbury.

719. *The Passenger Cases*, 48 U.S. at 479 (Taney, C.J., dissenting); *id.* at 500–02 (Nelson, J., dissenting); *id.* at 518 (Daniel, J., dissenting); *id.* at 524–25 (Woodbury, J., dissenting). Chief Justice Taney's dissent was consistent with his opinion in *Dred Scott* in its strict construction of national enumerated power. Scott v. Sandford, 60 U.S. (19 How.) 393, 401–04 (1856). Taney argued that "commerce" could not be construed to include regulation of passengers, *The Passenger Cases*, 48 U.S. at 493, that the Naturalization Clause was limited to rights of citizenship, *id.* at 483, and that the Migration Clause applied exclusively to slaves. *Id.* at 474.

720. *Id.* at 467–68 (Taney, C.J., dissenting); *id.* at 494 (Daniel, J., dissenting); *id.* at 520 (Woodbury, J., dissenting).

721. *Id.* at 470 (Taney, C.J., dissenting).

722. *Id.* at 467 (Taney, C.J., dissenting).

723. *Id.* at 513–14 (Daniel, J., dissenting); *id.* at 527 (Woodbury, J., dissenting).

724. *Id.* at 525 (Woodbury, J., dissenting) (citing VATTEL, *supra* note 56, bk. 1, ch. XIX, §§ 219, 231, and bk. II, ch. VII, §§ 93, 94).

725. *The Passenger Cases*, 48 U.S. at 545 (Woodbury, J., dissenting).

of every sovereign State to impose such terms as she pleases on the admission or continuance of foreigners within her borders."[726]

The *Passenger Cases* closed the major immigration confrontations of the first half of the century with little resolution of the power to restrict the entry and exit of aliens. The Alien Act had raised a substantial question of whether the power to expel friendly, lawful resident aliens resided in any part of the state or national government. *Miln* and the *Passenger Cases* posed the more modest question of whether states could monitor and regulate the arrival of foreign nationals, and the Court expressed mixed views regarding whether this power lay in the national government or was part of the states' inherent police powers. The Court upheld the power of the states to require passenger manifests, but rejected specific state efforts to tax immigrants, while generally acknowledging a state power to exclude slaves, free blacks, and immigrant convicts and paupers. The Court was fiercely divided on the question, however, and the decisions in the *Passenger Cases* simply entrenched that disagreement. During this period, the claim that the immigration power was inherent in sovereignty was advanced primarily on behalf of the states. Members of the Court who favored national authority over immigration located the power in the enumerated clauses. No member of the Court suggested that the national government enjoyed an inherent, unenumerated power over immigration. On the other hand, no member raised the possibility posed by Madison that the power might be denied both levels of government. All assumed that the power was held by either the national government or the states.

E. The Post-Civil War Era and the Ascendance of the Commerce Clause

The Civil War removed the question of slavery from immigration debates, and the Fourteenth Amendment established the national character of American citizenship. With questions regarding the power of states to regulate the entry of slaves resolved, the federal courts became increasingly willing to acknowledge immigration as an exclusive federal power and to locate that power in the Foreign Commerce Clause.

Congress did not pass a major immigration act until 1875,[727] and immigration doctrine in the first two decades after the Civil War continued to

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726. *Id.* at 524–25 (Woodbury, J., dissenting). Since the Constitution did not expressly grant a national power to exclude aliens, Woodbury concluded that the states must have the authority, since "the power must exist somewhere in every independent country." *Id.* at 543–44 (Woodbury, J., dissenting).

727. The "Page Law" of 1875 prohibited the entry of convicts, prostitutes, and involuntary "Oriental" laborers. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. In 1882, Congress imposed the first federal head tax on immigration and adopted the first Chinese Exclusion law. *See infra* notes 806–08 and accompanying text.

develop through scrutiny of state barriers to aliens. Cities and states on the West Coast now adopted a number of anti-immigrant provisions designed to restrain the growing Asian immigrant population, laws that were motivated both by nativist sentiment and by competition for jobs with local whites. Coastal states attempted to craft immigration restrictions that would satisfy the elusive constitutional strictures of *Miln* and the *Passenger Cases*, and the lower federal courts became increasingly hostile to their efforts.[728]

These cases percolated to the Supreme Court, and in 1875 the Court struck down statutes from New York, Louisiana, and California as violations of the Commerce Clause. *Henderson v. New York*[729] involved consolidated challenges to New York and Louisiana statutes which required ship masters to post a bond or pay a specified sum per passenger to alleviate the state's burden of caring for immigrants.[730] The states argued that the option of posting the bond avoided the infirmities confronted in the *Passenger Cases*. The ship masters in turn contended that the head taxes violated the Foreign Commerce Clause as unconstitutional state taxes on imports.[731]

The Court now had no difficulty concluding that the laws burdened foreign commerce. Writing for a unanimous Court, Justice Miller observed that, since the decision in *Gibbons v. Ogden*,

> the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other branches of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders.[732]

Given immigrants' contribution to the national economy, Miller noted, it could not be doubted that laws regulating their transport involved a branch of commerce.[733] Moreover, the immigration power implicated relations with

728. People v. Downer, 7 Cal. 169 (1857) (striking down a $50 tax on Chinese immigrant passengers); Ling Sing v. Washburn, 20 Cal. 534 (1862) (striking down a monthly tax of $2.50 on Chinese immigrants, the purpose of which was to discourage immigration); *In re* Ah Fong, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (No. 102) (Field, J., Circuit Justice) (striking down a California inspection statute on the grounds that immigration power is "exclusively within the jurisdiction of the General Government, and is not subject to State control or interference"). *Cf.* Ho Ah Kow v. Nunan, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,546) (Field, J., Circuit Justice) (holding that a San Francisco "Queue ordinance" violated aliens' right to equal protection, which applies to persons, not citizens).

729. 92 U.S. 259 (1875).

730. By the time of *Henderson*, the New York statute required masters to provide a report of passengers to the mayor and either to post a bond of $300 for every passenger to indemnify the City for any costs of support or to pay a head tax of $1.50 per passenger. *Id.* at 267.

731. New York was receiving 100,000 immigrants a year, the plaintiffs argued, and the bonds on this flow would amount to a $30 million tax on shippers annually. Brief for Appellants at 18, *Henderson* (No. 880).

732. *Henderson*, 92 U.S. at 270.

733. *Id.* at 270–71 ("[Immigrants] till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture .... Can it be doubted

foreign states.[734] The Court concluded that the power was national and exclusive[735] and called upon Congress to provide a uniform system of laws in the area.[736]

The contrast between *Henderson* and the earlier decisions was striking. Previously, the Court had struggled to acknowledge some state control over immigration, and four members of the Court had urged that the state power was exclusive. But the Court now unequivocally held that Congress had the exclusive power pursuant to the Foreign Commerce Clause. Inherent powers did not figure into the argument.

The Court found the similar California statute in *Chy Lung v. Freeman*[737] so coercive as to warrant open ridieule. The California statute required ship masters to post a bond for passengers deemed to be paupers, criminals, lewd or debauched women, or likely to become public charges.[738] The plaintiff, a Chinese national, had been singled out as "lewd and debauched" at the port of San Francisco. While the others were released on habeas corpus by Justice Field, who served as Circuit Justice to the Ninth Circuit,[739] Chy Lung challenged the statute in the U.S. Supreme Court. The plaintiff primarily advanced an equal protection argument, asserting that an equivalent law would not be imposed on subjects from England or France and that Chinese were entitled to the same rights.[740] "Under [the Fourteenth Amendment]," the plaintiff wrote, "*every person*, whether nativc or *foreign*, is entitled to *equal protection* of our laws."[741] The Attorney General appeared on behalf of the United States,[742] but California declined to appear or to submit a brief.[743]

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that a law which prescribes the terms on which vessels shall engage in [transportation of immigrants] is a law regulating this branch of commerce?").

734. *Id.* at 273.

735. *Id.* at 272–74 (finding that "this whole subject has becn confided to Congress by the Constitution").

736. *Id.*

737. 92 U.S. 276 (1875).

738. Public charges included the "lunatic, idiotic, deaf, dumb, blind, crippled, or infirm." *Id.* at 277. The commissioner was authorized to charge 75 cents for inspecting each passenger and $3 for each bond. The bond for each designated passenger required two separate sureties who were residents of the state and who had not served as sureties for any other bond. The commissioner could charge $1 for each oath administcred to a surety. The ship master could avoid posting the individual bonds by paying a sum set solely by the Commissioner, who was authorized to keep 20%. *Id.* at 277–78.

739. Chy Lung was arrested with 20 other women, who were released on habeas by Justice Field, sitting as Circuit Justice. *See In re* Ah Fong, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102).

740. Brief for Plaintiff in Error at 5–6, *Chy Lung*, 92 U.S. 276 (1875) (No. 478).

741. *Id.* at 11.

742. *Chy Lung*, 92 U.S. at 277.

743. *Id.*

The Court, again through Justice Miller, unanimously invalidated the statute under the foreign commerce power.[744] In language highly sympathetic to the immigrant plaintiff, the Court deemed the statute "systematic extortion of the grossest kind" and contended that it was "hardly possible to conceive a statute more skillfully framed to place in the hands of a single man" an arbitrary power.[745] Justice Miller appeared sympathetic to Chy Lung's equal protection argument, asking, "[I]f this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress?"[746] The Court found the statute grossly overbroad to promote any potentially legitimate state interest in excluding criminals and paupers. Miller also noted that the statute impacted foreign relations, since under the statute, "a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country"[747] and "embroil us in disastrous quarrels with other nations."[748] Thus, the decision appeared motivated by a desire both to protect aliens seeking entry from unequal and arbitrary state treatment and to preserve national control over foreign relations.

The 1883 case of *New York v. Compagnie Générale Transatlantique*[749] presented a challenge to a New York quarantine statute requiring ship masters to pay one dollar for the inspection of every alien passenger arriving from a foreign port.[750] Writing for a unanimous Court, Justice Miller ob-

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744. *Id.* at 280.

745. *Id.* at 278. Regarding the commissioner's power, the Court noted:

> The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws, and without trial or hearing or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, to point with his finger to twenty . . . or a hundred if he chooses, and say to the master, "These are idiots, these are paupers, these are convicted criminals, these are lewd women, and these others are debauched women . . . ."

Id. With respect to the statute's effect on immigrants, the Court stated:

> The patriot seeking our shores after an unsuccessful struggle against despotism in Europe or Asia, may be kept out because there his resistance has been adjudged a crime. The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with his wealth to a new home, may be told she must pay a round sum before she can land . . . . Whether a young woman's manners are sueh as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco.

Id. at 281.

746. *Id.* at 279.

747. *Id.*

748. *Id.* at 280.

749. New York v. Compagnie Générale Transatlantique, 107 U.S. 59 (1883).

750. Act of May 31, 1881, 1881 N.Y. Laws 590 (raising money to execute the New York inspection laws). The inspection statute required immigration commissioners to identify "habitual criminals, or pauper lunatics, idiots, or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves and subject to become a public charge," and

served, "It has been so repeatedly decided by this court that such a tax as this is a regulation of commerce with foreign nations, confided by the Constitution to the exclusive control of Congress," that the issue was no longer open for debate.[751] In *Transatlantique*, the Court for the first time foreclosed all state immigration efforts. This may have been because Congress had finally adopted a general immigration statute in 1882.[752] "This legislation covers the same ground as the New York statute," the Court observed, "and they cannot coexist."[753]

In the 1884 *Head Money Cases*,[754] the Supreme Court for the first time considered the constitutionality of a federal immigration statute. The consolidated cases of *Edye* and *Cunard Steamship Co. v. Robertson* addressed the constitutionality of the 1882 Act to Regulate Immigration, which imposed a fifty-cent head tax and created an immigration support fund overseen by the Secretary of Treasury.[755] The Act closely paralleled the state laws that the Court previously had invalidated. Various shipping companies challenged its constitutionality on the now-futile argument that the law was a police measure,[756] that the Constitution did not give Congress the power to tax immigrants,[757] and that to recognize the power was tantamount to holding "that Congress possesses an unlimited sovereignty inherent to an autocratic form of Government."[758]

The *Head Money Cases* were the federal government's first appearance as a party to an immigration case, and the decisions of the prior decade offered the United States a clear argument under the Foreign Commerce Clause. Remarkably, however, the Solicitor General's four page brief relied entirely on a theory of inherent sovereign powers.[759] Indeed, the government's brief failed to even mention the Commerce Clause. Two years before the Court articulated the theory of inherent powers in the 1886 Indian

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persons who brought "infectious or contagious disease." *Transatlantique*, 107 U.S. at 60–61. The New York quarantine statutes had been adopted after the previous New York laws were voided in *Henderson* and the *Passenger Cases*.

751. *Transatlantique*, 107 U.S. at 60.

752. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

753. *Transatlantique*, 107 U.S. at 63.

754. 112 U.S. 580 (1884).

755. In addition to collecting the 50-cent head tax, state immigration officers were directed to board and inspect passenger vessels to identify any foreign "convict, lunatic, idiot, or any person unable to take care of himself or herself, without becoming a public charge," and to bar such persons from landing. The Secretary was also directed to prepare rules for the protection of immigrants and for the return of those forbidden to land. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214, 214.

756. Brief for Plaintiffs in Error at 13–15, Edye v. Robertson, 112 U.S. 580 (1884) (No. 772).

757. Brief for Plaintiffs in Error at 20–22, Cunard S.S. Co. v. Robertson, 112 U.S. 580 (1884) (No. 754).

758. Brief for Plaintiffs in Error at 17, *Edye* (No. 772).

759. Brief for the United States at 2–3, *Edye* (No. 772).

case of *United States v. Kagama*,[760] the government in the immigration context rested squarely on a theory of sovereign powers antedating the Constitution and directly foreshadowed Justice Sutherland's theory of inherent external powers. The Solicitor General maintained that Congress's power to regulate immigration was "implied in [the] very existence of independent government anterior to the adoption of a constitution," and that constitutional provisions relevant to the power were "merely in recognition, and not in creation thereof."[761] Relying on Cooley, the Solicitor General asserted that the Constitution neither created nor restrained federal power over aliens and foreign relations:

> It cannot be a valid objection [to the statute] that . . . it does not come within any phrase in the . . . Constitution. That nomenclature is intended to define the relation of a government of enumerated powers toward those persons (the people and the States) with respect to which it is a government . . . . As to foreign Governments and non-resident foreigners the United States is not of merely enumerated powers. Such parties can by themselves question no exertion of its force in the view of its being 'unconstitutional.' As to them, it has all the powers which according to international law any sovereign society possesses . . . . The Constitution is merely a *domestic* thing, whilst the nation itself has *foreign* relations, powers and duties, as well as domestic.[762]

Territoriality and social contract theories helped shape the Solicitor General's vision. Immigrants leaving one country and entering another were in a "proverbially ticklish" position, the government argued, a sort of limbo, relatively unprotected by either constitutions or treaties.[763] "These 'immigrants,' therefore, not being citizens of the United States, [were], *previously to any allowed and perfected arrival by them*, beyond the verge of constitutional restrictions."[764] In short, foreign nationals who had not lawfully entered the United States could not object to the Constitution's infraction.

The Supreme Court declined the government's invitation to embrace an inherent powers argument. Justice Miller, who would reject the government's Commerce Clause theory in favor of an inherent powers argument in *Kagama*, again wrote for a unanimous Court and again upheld

760. 118 U.S. 375 (1886).

761. Brief for the United States at 2, *Edye* (No. 772). *See also id.* at 2–3 (stating that the Constitution's express provisions in this area were "rather recognitions of an antecedent 'primitive formation' of social power than grants thereof").

762. *Id.* at 3 (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 197 (Boston, Little, Brown & Co., 5th ed. 1883)).

763. *Id* at 4.

764. *Id.* at 3–4 (emphasis added).

the statute under the commerce power.[765] Indeed, he seemed surprised at the effort to challenge the statute.[766] The Court in the *Head Money Cases* relied exclusively on an enumerated powers-Commerce Clause analysis, without reference to any other provision of the Constitution. The only suggestion of the Court's future inherent powers approach was the Court's holding—in response to the plaintiffs' allegations that the Act discriminated against immigrants who were not paupers and criminals and violated the Appropriations Clause—that "Congress, and not the courts, are the sole judges" of such matters.[767] "Congress having the power to pass a law regulating immigration as a part of commerce of this country with foreign nations," the Court reasoned, "we see nothing in the statute [that is] forbidden by any other part of the Constitution."[768]

F. Chinese Immigration and the Exclusion Laws

In 1882 Congress passed both the head tax upheld in the *Head Money Cases* and the first of the Chinese Exclusion Acts. The 1882 Act restricting Chinese immigration resulted from a long history of West Coast antagonism to Chinese and other Asian immigration. Asian laborers had been brought to the United States in the mid-1800s to construct the transcontinental railroad,[769] and the gold rush of 1849 concentrated Chinese laborers on the West Coast, many under contract to their employers. A federal statute established a federal policy of encouraging immigration,[770] and Chinese immigration also was encouraged by the 1868 Burlingame Treaty with China,[771] which recognized "the inherent and inalienable right of man to change his home and allegiance," and "the mutual advantage of the free migration and emigration of their citizens and subjects."[772] More

765. The Head Money Cases, 112 U.S. 580, 600 (1884) ("Congress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations . . . .").

766. *Id.* at 591 ("That these statutes are regulations of commerce . . . is conceded in the argument in this case; and that they constitute a regulation of that class which belongs exclusively to Congress is held in all the cases in this court.").

767. *Id.* at 599.

768. *Id.* at 600.

769. Chinese laborers constituted 90% of the Central Pacific Railroad's workforce. LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 8 (1995).

770. Act of July 27, 1868, ch. 249, 15 Stat. 223 (providing that "the right of expatriation is a natural and inherent right of all people, . . . and . . . in . . . recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship"), *quoted in* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion*, 100 HARV. L. REV. 853, 855 n.10 (1987). The 1864 Act to Encourage Immigration also authorized the federal government to enforce contracts for imported contract laborers. *See* ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 20, 270 n.6 (1998).

771. Treaty with China, July 28, 1868, U.S.-China, 16 Stat. 739 [hereinafter Burlingame Treaty].

772. *Id.* art. V.

specifically, Article VI of the treaty provided that Chinese nationals in the United States "shall enjoy the same privileges, immunities and exemptions in respect to travel or residence" as U.S. citizens, although the treaty also expressly denied the Chinese U.S. citizenship.[773] By 1870, 63,199 Chinese were in the United States.[774] Forty-six percent of workers in the four major San Francisco industries, and twenty-five percent of all California workers, were Chinese.[775] By 1880, Chinese in the United States numbered 105,465.[776] The Chinese also organized in defense of their interests. The Chinese Consolidated Benevolent Association, a powerful board of representatives of the Chinese community in San Francisco (informally known as the Chinese Six Companies) aggressively and often effectively represented the civil rights of arriving and resident Chinese nationals against discriminatory state and federal legislation.[777]

Such efforts became increasingly necessary as anti-Chinese sentiment grew, particularly on the West Coast. Theories of Chinese racial inferiority spread quickly with the appearance of the Chinese in California. As early as 1854, the Supreme Court of California interpreted a California statute prohibiting "blacks and Indians" from testifying in criminal proceedings against whites as barring testimony by Chinese. The court reasoned that the Chinese were a "distinct . . . race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point."[778] The decision reflected sentiment in a portion of the white community that Chinese were "barbarians" like Indians, and only slightly more advanced than blacks.[779] Emerging racial antagonisms were exacerbated by economic depression and drought during the 1870s, which brought low wages and widespread unemployment.[780] Chinese immigration was increasingly opposed by white labor groups, who equated Chinese workers with indentured "coolie labor" which unfairly undermined white

773. *Id.* art. VI. The privileges and immunities provision of the treaty resulted in part from the political lobbying efforts of the Chinese Six Companies. SMITH, *supra* note 95, at 312.

774. SALYER, *supra* note 769, at 8.

775. *Id.*

776. *Id.* (citing U.S. Bureau of the Census, Statistical Historical Abstraets, series A91-104, 14). For further discussion of early Asian immigration on the West Coast, see RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 79–131 (rev. ed. 1998).

777. For further discussion of the Chinese Six Companies, see Ellen D. Katz, *The Six Companies and the Geary Act: A Case Study in Nineteenth-Century Civil Disobedience and Civil Rights Litigation*, 8 W. LEGAL HIST. 227, 231–39 (1995).

778. People v. Hall, 4 Cal. 399, 404–05 (1854). The Court also remarkably reasoned that the term "Indians" in the statute included the Chinese, since Columbus had thought that he discovered Asia. *Id.* at 400–05.

779. *See* SMITH, *supra* note 95, at 312 (discussing West Coast hostility towards Chinese immigrant laborers).

780. SALYER, *supra* note 769, at 9, 12.

working conditions and wages.[781] Dennis Kearney's Workingmen's Party used anti-Chinese sentiment to win one-third of the seats to California's 1878 constitutional convention.[782] The resulting state constitution of 1879 denied Chinese the right to vote, prohibited their employment by private corporations, and purported to prohibit "Asiatic coolieism" as a form of human slavery.[783] Anti-Chinese sentiment also was prevalent at the national level. In 1862, Congress prohibited involuntary Asian immigration,[784] and the 1875 Page Act again barred involuntary "Oriental" laborers, as well as convicts and prostitutes.[785]

As with Indians, the adoption of the Reconstruction civil rights acts and the Fourteenth Amendment raised the question of the relationship of Chinese nationals to the U.S. constitutional structure.[786] In explaining his veto of the Civil Rights Act of 1866, President Johnson criticized its incorporation of Chinese, Indians, blacks, and gypsies into the American citizenry:

> By the first section of the bill, all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States.[787]

White European immigrants had been entitled to citizenship since 1790; blacks ultimately were included in the 1870 naturalization statute, and many Indians were granted citizenship under treaties and statutes such as the Dawes Act in the late 1880s. Chinese were not covered by the naturalization statutes, however, and the Burlingame Treaty expressly preserved their non-citizen status.[788] Even the Chinese community's right to birthright citizenship under the Fourteenth Amendment remained ambiguous until the 1898

781. *Id.* at 10. For further discussion of the relationship between Chinese immigration and American labor, see generally GYORY, *supra* note 770.

782. SALYER, *supra* note 769, at 12.

783. *Id.* at 12–13; PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 203 (1997). Most of these anti-Chinese provisions were later invalidated by the courts as violating the Burlingame Treaty and constitutional equal protection.

784. Act of Feb. 19, 1862, ch. 27, §§ 2158–2164, 12 Stat. 340 (1862) (codified at 8 U.S.C. §§ 331–339) (targeting the "Coolie" trade by prohibiting the preparation or use of any vessel for the purpose of procuring from China an inhabitant of China, excepting those emigrating voluntarily), *repealed by* Act of Oct. 20, 1974, Pub. L. No. 93–461, 88 Stat. 1387.

785. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. *See supra* note 727.

786. *See* United States v. Wong Kim Ark, 169 U.S. 649, 697–98 (1898) (discussing debates over the Civil Rights Act of 1866).

787. *Id.* at 682 (citation omitted); *see also id.* at 697–98 (discussing congressional debates over whether children born to Asian immigrants would be citizens under the proposed Civil Rights Act and proposed Fourteenth Amendment).

788. Burlingame Treaty, *supra* note 771, art. VI.

decision upholding Chinese citizenship in *Wong Kim Ark*.[789] Thus, through the latter half of the century, Asians remained the United States' only immigrant group who were absolutely denied the right to become citizens.[790]

As the federal courts consistently invalidated local efforts to discourage Chinese immigration, pressure increased on Congress to address the situation. In 1876, Congress appointed a joint committee to investigate the impact of Chinese immigration on the United States. Written by California Senator Aaron Augustus Sargent, the resulting report warned of dangers and recommended modifying the Burlingame Treaty.[791] In February 1879, the California constitutional convention petitioned Congress for immigration restrictions, contending that immigration of Chinese laborers constituted "an Oriental invasion" and "a menace to our civilization" and that discontent with the problem was "universal."[792]

Among those calling for national legislation to restrict Chinese immigration was Justice Field. Although as a Circuit Justice Field consistently struck down state and local attempts to burden Chinese immigrants, he simultaneously called for congressional restrictions on Asian immigration.[793] As a presidential hopeful in the 1880 and 1884 elections, Justice Field figured prominently in the efforts to persuade Congress to restrict Asian immigration. In an 1879 interview, Field asserted an overtly ascriptivist view of immigration. "[T]he practical issue," he argued, "is, whether the civilization of this coast, its society, morals, and industry, shall be of American or Asiatic type."[794] Field's campaign literature urged the necessity of protecting American institutions from "the oriental gangrene."[795] Field is believed to have authored the Democratic National Convention platform plank calling for restrictive national legislation.[796] Field also worked aggres-

789. 169 U.S. 649 (1898). *See infra* notes 1059–82 and accompanying text.

790. SALYER, *supra* note 769, at 13.

791. H.R. REP. NO. 46-872.

792. *See* Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).

793. In the 1879 case of *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546) (Field, Circuit Justice) (invalidating a San Francisco ordinance requiring male Chinese prisoners to shave their queues), Field acknowledged the "positive . . . hostility prevailing in California against the Chinese," and confessed that "thoughtful persons, looking at the millions which crowd the opposite shores of the Pacific, and the possibility at no distant day of their pouring over in vast hordes among us, . . . hope that some way may be devised to prevent their further immigration." *Id.* at 256. He concluded, however, that such appeals "must be made to the general government." *Id.* *See also In re* Ah Fong, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice) ("If their further immigration is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies."); CHAUNCEY F. BLACK & SAMUEL B. SMITH, SOME ACCOUNT OF THE JUDICIAL WORK OF STEPHEN J. FIELD AS A LEGISLATOR, STATE JUDGE, AND JUDGE OF THE SUPREME COURT OF THE UNITED STATES 390, 404–05 (reprint 1986) (1881).

794. CARL B. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 221 (1969) (citation omitted).

795. KENS, *supra* note 783, at 205; *see also id.* at 205–09.

796. MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 10 n.29 (1946).

sively to ensure modification of the Burlingame Treaty to allow restrictions on Chinese immigrant labor.[797]

Many national political figures believed that immigration restrictions could not be adopted without abrogating the Burlingame Treaty's free migration provisions.[798] In 1879, Congress passed legislation restricting Chinese immigration to fifteen passengers per steamship, but President Hayes vetoed it as violating the Treaty.[799] In response to what Field later described as "urgent and constant" prayers for relief against "existing and anticipated evils,"[800] Hayes later appointed, and Congress funded, a commission to negotiate a treaty modification with China.[801]

The resulting 1880 treaty with China allowed the United States to "regulate, limit, or suspend" future immigration of Chinese laborers, but not to prohibit it absolutely.[802] The treaty preserved the rights of Chinese laborers who were already in the United States, who would "be allowed to go and come of their own free will and accord," and who would "be accorded all the rights, privileges, immunities, and exemptions" of U.S. citizens.[803] Following the ratification of the 1880 treaty, Congress passed legislation suspending Chinese immigration for twenty years, which President Chester Arthur vetoed as an unreasonable restriction in violation of the treaty.[804] Debates in Congress regarding legislation singling out the Chinese for immigration restrictions pitted the emerging concept of constitutional equal protection against racial, cultural, and economic justifications for differential treatment of the Chinese. While legislators such as Senator George F. Hoar of Massachusetts contended that equal protection prohibited differential treatment of a racial group, Senator La Fayette Grover of Oregon retorted with classic nativist social contract arguments. "When [the signers of the Declaration of Independence] declared that all men were created equal," he maintained, "they undoubtedly meant all men like themselves, and in like manner joined in the bonds of civil society."[805]

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797. SWISHER, *supra* note 794, at 222–24.

798. Chae Chan Ping v. United States, 130 U.S. 581, 596 (1889).

799. GYORY, *supra* note 770, at 166–67.

800. *Chae Chan Ping*, 130 U.S. at 596.

801. Act of May 14, 1880, ch. 88, 21 Stat. 133, 133–34; *see generally* GYORY, *supra* note 770, at 212–13; Shirley Hune, *Politics of Chinese Exclusion*, 9 AMERASIA J. 5, 15–17 (1982).

802. Treaty between the United States and China Concerning Immigration, May 19–July 19, 1880, U.S.-China, 22 Stat. 826.

803. *Id.* art. II.

804. GYORY, *supra* note 770, at 244–45. The Senate failed to override the veto by five votes. *Id.* at 244.

805. 13 CONG. REC. S1546 (1882) (statement of Sen. La Fayette Grover); *see also id.* at 1483, 1484, 1485, 1518–19, 1586, 1635–37, 1644–45 (citing similar remarks by other members of Congress).

In 1882, Congress finally adopted legislation suspending entry of Chinese laborers[806] into the United States for ten years. Consistent with the treaty modification, the 1882 Act prohibited the arrival of new Chinese laborers while allowing existing residents to come and go from the United States upon the presentation of a customs certificate.[807] The Act also barred courts from recognizing U.S. citizenship for the Chinese.[808]

The Act apparently was extremely successful in reducing Chinese immigration. Custom House statistics showed that in the two years following the 1882 Act, 12,000 more Chinese departed than arrived.[809] Wages of Chinese laborers also rose from $1 to $1.75 per day.[810] Nevertheless, due to a widespread perception among political elites that new Chinese were entering on fraudulent claims of prior residence, and the alleged "notorious capabilities of the lower classes of Chinese for perjury," as a House committee reported,[811] Congress modified the 1882 Act in 1884 to provide that the Customs certificate would be the only evidence accepted for reentry.[812] This exclusion provision was quickly challenged by Chew Heong, a returning U.S. resident who had departed the country prior to passage of the 1882 and 1884 Acts, and thus could not have obtained the required reentry certificate.[813]

Chew Heong v. United States came to the Court in 1884 and was decided the same day as the *Head Money Cases*.[814] Chew Heong argued that the statute must be construed consistent with his treaty right to reenter the

806. Section 15 of the Act defined "Chinese laborers" to mean "both skilled and unskilled laborers and Chinese employed in mining." Act of May 6, 1882, ch. 126, § 15, 22 Stat. 58, 61.

807. *Id. See also* 13 CONG. REC. H1973 (1882) (summarizing the majority opinion of the House regarding the 1882 Act). Section 3 of the Act exempted existing resident laborers from the exclusion provisions, and section 4 entitled them to obtain a certificate as "proper evidence of their right to go from and come to the United States of their free will and accord." Section 4 further provided that presentation of the certificate to a customs officer "shall entitle the Chinese laborer . . . to return to and re-enter the United States." The Act authorized the deportation of "any Chinese person found unlawfully within the United States" after the individual was "brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States."

808. Act of May 6, 1882, § 14 (declaring that "hereafter no State court or court of the United States shall admit Chinese to citizenship").

809. *In re* Cheen Hong, 21 F. 791, 807–08 (C.C.D. Cal. 1884) (No. 3,472); *see also* Plaintiff's Statement of Case at 43, Chew Heong v. United States, 112 U.S. 536 (1884) (No. 1088) (stating that between August 4, 1882 and January 15, 1884, 3,415 Chinese entered at the port of San Francisco, while 17,088 were deported).

810. Plaintiff's Statement of Case at 43, *Chew Heong* (No. 1088).

811. House Committee of Foreign Affairs Report on the Act of 1884, *quoted in* Brief for the United States at 11, *Chew Heong* (No. 1088).

812. Act of July 5, 1884, ch. 220, § 4, 23 Stat. 115, 115–16.

813. Chew Heong v. United States, 112 U.S. 536, 536–37 (1884).

814. *See supra* notes 754–68 and accompanying text.

United States[815] and challenged the rule designating the certificate as the only conclusive evidence of residency as violating Fifth Amendment due process.[816] No question of Congress's constitutional authority to regulate immigration was presented.[817]

The United States defended the certificate policy as necessary to make the suspension of immigration effective.[818] The government primarily defended the statute as either consistent with, or as superseding, the treaty.[819] The government objected to the plaintiff's due process argument, however, with a plenary power argument. Congress, the government contended, had the absolute right to determine "who shall enter the country, and on what terms."[820] Regardless of the resulting hardship, "the Constitution is not broken, for the alien has no constitutional right to set foot on our shore except on the terms Congress has prescribed."[821]

In a seven-to-two decision,[822] the Supreme Court construed the statute to uphold Chew Heong's right to reenter. Writing for the majority, Justice Harlan held that the statute must be construed consistent with the treaty to preserve the right of exit and entry of Chinese laborers who had been in the United States when the treaty was signed.[823] Justice Field, who had ruled against Chew Heong below,[824] filed a lengthy and outraged dissent.

Thus, through 1884, on the threshold of the inherent powers era, the Court had consistently recognized the Commerce Clause as the source of federal immigration authority, but the application of the Constitution's individual rights protections to aliens remained unclear. Prior decisions largely had been limited to the source of Congress's power over aliens. Chew

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815. *See* Plaintiffs' Statement of Case by Attorney Riordan at 11–13, *Chew Heong* (No. 1088) (arguing that Congress did not intend to interfere with rights obtained under the Burlingame Treaty).

816. *See id.* at 40–41 (arguing that "prescribing a conclusive rule of evidence, is a deprivation of both liberty and property without . . . due proeess of law"); Plaintiffs' Statement of the Case by Attorney Brown at 41–42, *Chew Heong* (No. 1088) ("If it is held that the act prohibits the Courts from hearing any evidence which can be introduced in any other case, where the liberty or property of a person is involved, then we maintain *that the statute . . . is a manifest violation of the 5th Amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law.*").

817. This omission may have occurred because the Act expressly implemented the 1880 treaty, and thus could be considered a necessary and proper exercise of the treaty power.

818. *See* Brief for the United States at 11, *Chew Heong* (No. 1088) ("[S]o much do these people resemble one another, and so profligate are the lower orders of them in the disregard of oaths, that without such legislation the tide of immigration would continue to flow in the name of the exempted class.").

819. *Id.* at 2–3.

820. *Id.* at 14.

821. *Id.* at 15.

822. Justices Field and Bradley dissented.

823. *Chew Heong*, 112 U.S. at 549–50.

824. *In re* Cheen Heong, 21 F. 791 (C.C.D. Cal. 1884) (Field, Circuit Justice), *reprinted in* Proceedings Below at 7, *Chew Heong* (No. 1088).

Heong had raised a due process claim against the national government, but the Court did not address the claim. *Chy Lung* had tacitly recognized equal protection rights against states, but Chew Heong did not raise an equal protection challenge to the federal statute's restriction to the Chinese, likely because equal protection did not then apply to the national government.[825] Modern equal protection doctrine was soon significantly advanced, however, by the 1886 decision in *Yick Wo v. Hopkins*.[826]

1. Yick Wo v. Hopkins.—Together with *Wong Wing v. United States*[827] and *Wong Kim Ark v. United States*,[828] *Yick Wo* stands as one of the late-nineteenth-century Court's most powerful affirmations of the liberal, egalitarian vision of the Constitution. The case, of course, involved an equal protection challenge by two Chinese nationals[829] to a San Francisco ordinance prohibiting the operation of wood laundries without a permit. The ordinance established no criteria on which the decision to grant or deny a permit would be based. The California laundry industry was predominately Chinese,[830] and in an earlier 1885 case, the Chinese community had challenged a related ordinance as motivated by invidious anti-Chinese sentiment.[831] The Supreme Court had rejected the facial challenge, finding, per Justice Field, that the ordinance was warranted by the need to avoid fires in a windy city, was facially neutral, and could not be invalidated "unless in its enforcement it is made to operate only against the class

825. The Supreme Court did not formally interpret the Fifth Amendment as incorporating equal protection principles until *Bolling v. Sharpe*, 347 U.S. 497 (1954), although the concept of equal treatment at the federal level was respected and enforced by the Fuller Court in other contexts. *See, e.g.*, Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 420 (1894) (holding that a rate regulation violated equality before the law). *See infra* notes 1706–08 and accompanying text.

826. 118 U.S. 356 (1886).

827. 163 U.S. 228 (1896) (concluding that aliens are entitled to Fifth and Sixth Amendment protections in criminal proceedings). *See infra* notes 1037–58 and accompanying text.

828. 169 U.S. 649 (1898) (holding that Chinese persons are entitled to natural born citizenship). *See infra* notes 1059–82 and accompanying text.

829. Yick Wo and his co-plaintiff, Wo Lee, were lawful Chinese residents who had been engaged in the laundry business for 22 and 25 years, respectively. Authorities and Arguments for Defendant and Respondent at 1, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (No. 1280, 1281). Yick Wo sought habeas in the Supreme Court of California, while Wo Lee filed in the California federal court. The California Supreme Court upheld the San Francisco ordinance, based on a decision of the appeals commission, as a valid exercise of the police power. Circuit Judge Sawyer concluded the statute vested arbitrary and discriminatory power in the city officials, but nevertheless denied Wo Lee's petition in deference to the state Supreme Court decision. Arguments of Hall McCallister, C.H. Van Shaick, and D.L. Smoot, for Appellants and Plaintiffs in Error at 1–2, *Yick Wo* (No. 1280, 1281).

830. In the period between 1870 and 1890, Chinese persons constituted approximately 70% of all workers in the California laundry industry. TAKAKI, *supra* note 776, at 92. Laundry was one of the few industries open to Chinese workers by the latter 1800s, and by 1900, 25% of all Chinese males in the U.S. were laundry workers. *Id.* at 93.

831. Soon Hing v. Crowley, 113 U.S. 703 (1885).

mentioned . . . ."[832] The following year in *Yick Wo*, the Chinese plaintiffs alleged precisely that.

The extant Supreme Court briefs from the case are extremely poor. The brief for the plaintiffs is a mere thirteen pages, alleging disparate enforcement of the statute[833] and summarily asserting violations of equal protection, due process, and the treaty with China.[834] San Francisco's lengthy submission, on the other hand, argued that the eity had consistently denied permits to laundries with wood scaffolding on the roofs, and that, as a precaution against fire, the ordinance was a valid exercise of the police power.[835] Much of the city's brief was dedicated to invective about the Chinese and their well-financed legal attack, which the city contended was thwarting its efforts to enforce valid laws.[836]

Despite the poor briefing, the Supreme Court had no difficulty striking down the ordinance. Writing for the Court, Justice Matthews articulated the classical limited government approach to alienage. "The rights of the petitioners," he held, "are not less because they are aliens and subjects of the Emperor of China."[837] Matthews observed that the Fourteenth Amendment refers to "Persons" and "is not confined to the protection of citizens."[838] Moreover, "the fundamental rights to life, liberty, and the pursuit of happiness" were "universal in their application to all [p]ersons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[839] Thus, aliens enjoyed the same treatment as citizens under the questions presented.[840]

Matthews found with equal ease that the San Francisco ordinance, as applied, violated equal protection. The ordinance conferred on city officials "a naked and arbitrary power,"[841] which, if "applied . . . with an evil eye and an unequal hand," constituted "a practical denial" of equal protection.[842] Matthews specifically denied that governmental sovereignty could warrant such arbitrariness:

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832. *Id.* at 711.

833. Plaintiffs contended that all 200 Chinese who had requested permits had been denied, while all 80 Caucasian applicants, with one exception, had been granted permits. Brief for Plaintiffs at 2, *Yick Wo* (No. 1280, 1281). San Francisco disputed these facts, arguing that only two white laundries had been granted permits and that these laundries employed large numbers of Chinese. Brief for Defendant at 20, 26–27, *Yick Wo* (No. 1280, 1281).

834. Brief for Plaintiffs at 5–6, *Yick Wo* (No. 1280, 1281).

835. Brief for Defendant at 13, 15, *Yick Wo* (No. 1280, 1281).

836. *Id.* at 17–20.

837. *Yick Wo*, 118 U.S. at 368–69.

838. *Id.* at 369.

839. *Id.*

840. *Id.*

841. *Id.* at 366.

842. *Id.* at 373–74.

> When we consider the nature and theory of our institutions of government . . . we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.[843]

Matthews's decision in *Yick Wo* could be read as imposing a territorial restriction on the constitutional protection of aliens, since he observed that "these provisions [of due process and equal protection] are universal in their application to all persons *within the territorial jurisdiction.*"[844] The case did not present any questions of territoriality, however. Moreover, Matthews also cited the decision in *Chy Lung* in support of his equal protection analysis, which had involved an alien who had not yet legally entered the United States.[845]

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In short, the Court's decisions between 1875 and 1886 rejected the possibility of an exclusive or concurrent state power over immigration and upheld an exclusive federal authority to impose head taxes and inspect immigrants. Throughout the period, the Court evaluated the statutes before it according to ordinary enumerated powers analysis. The Court located the federal immigration power in the Commerce Clause, and applied equal protection and due process principles in *Chy Lung* and *Yick Wo* to reject state laws that arbitrarily impacted aliens. Antebellum rhetoric about inherent power disappeared from the Court's jurisprudence. The Court did not rely on international law as a source of authority, and it declined the theory of inherent and plenary powers urged by the Government in the *Head Money Cases* and *Chew Heong.* With the possible exception of a vague passage in the *Head Money Cases*, none of these decisions suggested that congressional power over aliens was in any way insulated from ordinary rules of constitutional jurisprudence.

The inherent powers era was fast approaching, however. The same year that the Supreme Court decided *Chew Heong*, the Court held in the *Legal Tender Cases* that Congress enjoyed "powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution."[846] Writing for the Court, Justice Gray looked to international

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843. *Id.* at 369–70.

844. *Id.* at 369 (emphasis added).

845. *Id.* at 374.

846. Juilliard v. Greenman, 110 U.S. 421, 450 (1884). The case involved a highly contentious challenge to Congress's power to designate paper money as legal tender of the United States. Congress originally created paper money during the Civil War in legislation that later was upheld by the Court as an emergency war measure. *See* The Legal Tender Cases, 79 U.S. 457, 529 (1871).

concepts of sovereignty to inform the Constitution's provisions.[847] Gray reasoned that the power to lay and collect taxes "either embodies a grant of power to pay the debts of the United States *or presupposes and assumes that power as inherent in the United States as a sovereign government.*"[848] The power to designate legal tender had been "a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing," which continued to be exercised in Europe.[849] Since the power was "one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution," he concluded that the power was within the constitutional authority of Congress.[850] The question whether the exigencies at any particular time justified resort to the measure was "a political question, to be determined by Congress."[851]

The Court in the *Legal Tender Cases* ultimately did not rely solely on inherent powers as the exclusive source of governmental power. Instead, the Court assumed that the Constitution's provisions broadly encompassed the powers held by other sovereign states. Nevertheless, the approach was novel, and Justice Field dissented bitterly over inherent powers:

> *Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government*. . . . [T]here is no such thing as a power of inherent sovereignty in the government of the United States . . . . In this country sovereignty resides in the people . . . .[852]

Like Madison's Report to the Virginia Legislature, Field specifically rejected the assumption that powers withheld from the states necessarily were possessed by the national government:

> It seems . . . to be supposed that, as the power was taken from the States, it could not have been intended that it should disappear

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Justice Bradley's concurrenee in the 1871 cases, however, relied more directly on inherent sovereign powers:

> The United States is not only a government, but it is a National government, and the only government in this country that has the character of nationality . . . . [I]t is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as such being essential to the exercise of its functions.

79 U.S. at 555–56 (Bradley, J., concurring). Chief Justice Chase dissented. *Id.* at 582 ("[W]e reject wholly the doctrine, advanced for the first time, we believe, in this court, . . . that the legislature has any 'powers under the Constitution which grow out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted by it.' If this proposition be admitted . . . the government becomes practically absolute and unlimited."). Congress later reenacted the legal tender laws after the Civil War, and the 1884 cases involved the controversial question whether Congress possessed this power in peacetime. *See Juilliard*, 110 U.S. at 437–38.

847. *Juilliard*, 110 U.S. at 447.

848. *Id.* at 440 (emphasis added).

849. *Id.* at 447.

850. *Id.* at 450.

851. *Id.*

852. *Id.* at 467 (Field, J., dissenting) (emphasis added).

> entirely, and therefore it must in some way adhere to the general government, notwithstanding the Tenth Amendment and the nature of the Constitution . . . . [T]he true doctrine is the very opposite of this. If the power is not in terms granted [by the Constitution], and is not necessary and proper for the exercise of a power which is thus granted, it does not exist.[853]

Field argued that the method of interpretation applied by the Court "would change the whole nature of our Constitution and break down the barriers which separate a government of limited from one of unlimited powers."[854] Two years later, on the same day that *Yick Wo* was decided, the Court in *Kagama* unanimously rejected the Commerce Clause as a basis for congressional legislation over Indian tribes and embraced the doctrine of inherent, plenary congressional power.[855]

G. *The Inherent Powers Era*

Chew Heong proved to be the *Crow Dog*[856] of the immigration decisions. The Court's broad, pro-immigrant statutory interpretation, and the continued willingness of the lower courts to accept claims of prior residence by Chinese arrivals lacking certificates, provoked a backlash on the West Coast and in Congress. Anti-immigrant forces viewed the decisions as flouting the express will of Congress. Private exclusion campaigns, characterized by violent riots, murder, and intimidation of Chinese persons, peaked on the West Coast in 1885 and 1886, while anti-Chinese sentiment among jurors made it impossible to bring the perpetrators to justice.[857] Congress quickly sought to negotiate a new supplemental treaty with China to allow further immigration restrictions and hastily adopted new legislation after the treaty negotiations fell through.[858] The 1888 act amended the existing exclusion laws by barring all Chinese laborers who had left the United States from returning, regardless of whether they held certificates, in direct breach of the 1868 and 1880 treaties.[859] During the debates over the legislation, concerns were raised regarding Chinese residents who had already left the United States with certificates in reliance upon their right to return, and a failed motion was made in the Senate to create an exception for

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853. *Id.* at 467–68 (Field, J., dissenting).

854. *Id.* at 466 (Field, J., dissenting).

855. United States v. Kagama, 118 U.S. 375, 378–79 (1886).

856. *See supra* note 370.

857. SALYER, *supra* note 769, at 21.

858. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (supplementing an act to execute certain treaty stipulations relating to Chinese).

859. *See id.* § 2 (declaring existing customs certificates to be "void and of no effect" and that the "chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States").

these aliens.[860] In signing the bill, the President called upon Congress immediately to pass further legislation creating an exception for this class of persons, but Congress did not act upon the suggestion.[861]

1. Chae Chan Ping v. United States.—The original Chinese Exclusion Case, *Chae Chan Ping v. United States*,[862] addressed whether Congress had constitutional authority to retroactively terminate the right of an alien resident to reenter the United States.[863] Chae Chan Ping had resided in the United States for twelve years prior to 1887, when he departed for China with a customs certificate indicating that he was a resident entitled to return to the United States.[864] He returned to San Francisco harbor six days after the passage of the 1888 Act and was denied entry.[865] Excluded alien residents like Chae Chan Ping were not allowed to recover any personal belongings or dispose of any personal property which they owned in the United States—property which the Chinese Consulate General contended amounted to "several millions of dollars."[866] The right to reenter of an estimated 20,000 Chinese nationals who had previously departed the United States with certificates was implicated by the case.[867]

Chae Chan Ping presented his case to the Supreme Court as a claim regarding the right of Congress to *expel* a lawful, long-term U.S. resident alien, rather than a question of entry.[868] Plaintiffs' counsel focused on Chae Chan Ping's lengthy prior residence in the United States and maintained that his absence from the country—on which the United States justified his exclusion—had been induced by the government's promise of his right to return.[869] The plaintiff's case thus, for the first time since the Alien Act, raised the question of the national government's power to summarily expel friendly resident aliens in time of peace.

The plaintiff asserted straight enumerated-powers and individual rights arguments. With respect to the source of Congressional authority, he contended that the Constitution did not delegate any power to Congress to

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860. *See* Chae Chan Ping v. United States, 36 F. 431, 433 (C.C.N.D. Cal. 1888).

861. *Id.*

862. 130 U.S. 581 (1889).

863. *Id.* at 589.

864. The customs certificate established the bearer's right "to return to and to re-enter the United States upon producing and delivering this certificate to the Collector of Customs." Briefs for Appellant by Attorneys Houndly and Carter at 3–4, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (No. 1446) [hereinafter Plaintiff's Brief I].

865. *Id.* at 2.

866. *Id.* at 36.

867. MARY ROBERTS COOLIDGE, CHINESE IMMIGRATION 280 (1968).

868. Brief for Appellant by Attorney James C. Carter at 3–4, *Chae Chan Ping* (No. 1446) [hereinafter Plaintiff's Brief II] ("Whatever power Congress may have to prohibit the immigration of other foreign citizens . . ., it had none to prohibit the *return* to this country of the appellant.").

869. Plaintiff's Brief I, *supra* note 864, at 33.

expel lawful resident aliens. Chae Chan Ping denied that the expulsion of lawful residents implicated foreign commerce.[870] The Act could not be upheld under the treaty power, since it expressly abrogated the China treaties. Nor could the Act be upheld under the war powers, since China was at peace with the United States, and Chae Chan Ping was not a belligerent.[871] Arguments based on sovereignty also failed on two grounds. First, Chae Chan Ping relied on international publicists to argue that international law did not allow civilized states to exclude or expel foreigners.[872] And second, even if international law did allow such actions, the United States enjoyed no such enumerated power.

Chae Chan Ping's individual rights arguments are not mentioned in the Supreme Court decision, and immigration law commentators traditionally have assumed that no individual constitutional rights claims were raised in the case.[873] However, the briefs reveal that Chae Chan Ping also squarely rooted his claim in a *Yick Wo* argument that the Constitution applied to resident aliens and prohibited their arbitrary expulsion without due process.[874] Plaintiff suggested that both principles of territoriality and membership supported his claim. Resident aliens were "'persons' within the jurisdiction of the United States, [to whom] all the protection afforded by the Constitution to 'persons' not citizens, can apply."[875]

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870. *Id.* at 67. *See also* Plaintiff's Brief II, *supra* note 868, at 4 (stating that "while the power to regulate commerce with 'foreign nations' may authorize congressional legislation to prevent the *entry* of foreign subjects, no one . . . will assert that any power is conferred on Congress to command them to surrender any residence . . . and *depart* from the country").

871. Plaintiff's Brief I at 20–21.

872. *Id.* at 14 ("[It] is doubtless a principle of the law of nations, as understood among civilized nations and in modern times, that no nation has the right to close its doors to foreiguers."). Plaintiff cited Woolsey's treatise on international law, *see supra* note 141, for the proposition that "[n]o State in peace can exclude the properly documented subjects of another friendly State or send them away after they have been once admitted without definite reasons, which must be submitted to the foreign government concerned." *Id. See also id.* at 14–15 ("No nation has the right to interdict absolutely the entrance of foreigners into its territory or to close the country to foreign commerce." (citing FIELD, *supra* note 599, § 318)); *id.* at 15 ("[S]overeignty is therefore not absolute, but limited by the law of nations.").

873. *See, e.g.*, Henkin, *supra* note 51, at 858 ("Apparently, the alien claimed no constitutional rights, and the Court did not independently probe possible constitutional objections to his exclusion."); LEGOMSKY, *supra* note 51, at 193 ("[T]he Court was not considering what the judicial role should be when an individual constitutional right has allegedly been violated.").

874. Plaintiff's Brief I, *supra* note 864, at 30, 62 ("It may be objected that Chae Chan Ping is not a citizen of the United States . . . but he is, nevertheless, a 'person', a member of the human race, within the definition and proteetion of the *Fifth* and *Fourteenth* Amendments to the Federal Constitution."); Argument on Behalf of Appellant by Attorneys Harvey S. Brown and Thomas D. Riordan at 7, *Chae Chan Ping* (No. 1446) [hereinafter Plaintiff's Brief III] ("The Act . . . is in contravention of the Fifth Amendment of the Constitution . . . in . . . that it deprives the Appellant of both Liberty and Property without due Process of Law."). Plaintiff also challenged the law as a bill of attainder or ex post facto law. *Id.* at 14.

875. Plaintiff's Brief I, *supra* note 864, at 34.

Chae Chan Ping relied heavily upon Madison's arguments regarding the Alien Act.[876] Like Madison, plaintiff's counsel equated a friendly resident alien to a person on whom the government had bestowed a vested property interest. Although the decision to admit was discretionary, it could not be revoked without good cause. The treaties, statutes, and certificate that granted Chae Chan Ping the privileges and immunities of citizenship and freedom of travel thus gave Chae Chan Ping "a *vested* right to return, which could not be taken from him by any exercise of mere *legislative* power."[877]

As in the *Head Money Cases*, the United States made no effort to defend the federal action under the Commerce Clause. Solicitor General Jenks instead asserted a territorial argument that because Chae Chan Ping was outside the country, the government had an absolute right to bar his reentry. Jenks argued that the power to exclude arose from the government's collective powers over foreign relations, which embraced the full sovereign powers enjoyed by independent states. The government suggested that these powers were supported by the Migration Clause:

> The whole tenor of the Constitution is that the United States is a nation, and, as to foreign nations and their subjects, is endowed with full sovereign powers.
>
> . . . .
>
> The implication from [the Migration Clause], is clear, that after the year 1808 Congress might prohibit the migration or importation of foreigners. As a nation the Government may exercise international powers.[878]

The government further cited Vattel for the proposition that "[i]nternational law fully establishes the right of a nation to exclude foreigners from its domain,"[879] and invoked Justice Marshall's decision in *The Schooner Exchange v. McFadden* that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute . . . . Any restriction upon it . . . from an external source, would imply a diminution of its sovereignty . . . ."[880]

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876. *Id.* at 37, 44. *See also* Plaintiff's Brief III, *supra* note 874, at 10–12 (discussing the Alien Act).

877. Plaintiff's Brief II, *supra* note 868, at 4.

878. Brief for the United States at 5, *Chae Chan Ping* (No. 1446).

879. *Id.* at 6–7 (stating that "the lord of a territory may, whenever he thinks proper, forbid its being entered . . . [and] [t]here are states, such as China and Japan, into which all foreigners are forbid to penetrate without an express permission") (quoting VATTEL, *supra* note 56, bk. 2, ch. VIII, §100, at 171–72). *See also id.* at 7 ("The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it.") (quoting 1 KENT'S COMMENTARIES *35). *Cf. supra* text accompanying note 581–587.

880. Brief for the United States at 6, *Chae Chan Ping* (No. 1446) (quoting The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 136 (1812)). *See supra* notes 107–09 and accompanying text.

This argument was flawed in a number of respects. The Court previously had expressly rejected the Migration Clause as a source of the immigration power,[881] and *The Schooner Exchange* said nothing about whether the United States' own domestic laws (e.g., the Constitution) limited the government's power in this area. The government's citations to international law for the power to exclude also failed to take note of the qualifications on the right to exclude reeognized by Vattel and others, and also was not on point to the extent that Chae Chan Ping's residence made the case one of expulsion, rather than exclusion.

The government did not expressly acknowledge Chae Chan Ping's due process argument other than to deny that he had a vested right to return. Because he resided here "by permission only," the United States argued, "[t]he withdrawal of that permission violated no personal right."[882] "On his departure the Government relinquished to him none of its sovereign power, to repeal its laws, nor did it give him any pledge that it would adhere in the future to any policy then existing. That he expected to return did not entitle him to do so."[883] Thus, the government denied that Chae Chan Ping's residence altered his status in any respect.[884]

In sum, although the government relied on concepts of international law and sovereignty, its argnment fell short of the broad assertion of inherent power offered by the United States in the *Head Money Cases*. The gist of the government's argument was that the power to exelude was recognized by international law and resided somewhere in the Constitution (presumably the Migration Clause).

California offered the most aggressive argument in favor of federal power. Appearing as an amicus, California urged that the power to exclude aliens was critical to a nation's sovereign autonomy:

> The power to determine what individuals of the human race, not citizens of the United States, may or may not peacefully come into the country from abroad . . . how they shall be treated while here, how long they may remain, and when and under what circumstances they shall be required to depart, *are essential attributes and prerogatives of*

881. New York v. Compagnie Générale Transatlantique, 107 U.S. 59, 62 (1883) ("There has never been any doubt that this clause had exclusive reference to persons of the African race.").

882. Brief for the United States at 11, *Chae Chan Ping* (No. 1446).

883. *Id.*

884. *Id.* at 11–12 ("[W]hether he resided in the United States before . . . gave him no right, under the act of 1888, to admission . . . . When the privilege to return or remain was absolutcly withdrawn . . . it was of no avail to prove that he had been here before or when he left."); *id.* at 14 ("If Chae Chan Ping claims he has exceptional privileges, which other Chinese laborers have not, who had not been residents of the United States before the passage of the act, the reply is that he held his exceptional privileges only by virtue of the laws which *then* existed. The law gave him the privilege, the repeal of the law has taken it away; and he has no rights greater than any other non-resident of the samc class.").

> *sovereignty, and a State can only lose them by being subjugated by another, in fact, by ceasing to be a State.*[885]

California asserted that the power to deal with aliens in time of war gave Congress full authority to deal with aliens in war or peace.[886] In fact, "necessities urgent as those of war demanded it."[887] Indeed, Congress had plenary power to expel aliens from *within* the country, if it wished.[888] California also waved the bloody shirt of the Civil War in support of national supremacy:

> [The Plaintiff's position] is a revival of the old contention of State Rights, with the Virginia resolution of 1798 urged as conclusive of the question . . . .
>
> Will counsel claim, in the present condition of the American Nation, and in the light of the events of the last quarter of a century, that aliens, objectionable to the United States at large, and believed to be dangerous to the interests of the entire country, can be protected and domiciled in any particular State by virtue of State laws, in defiance of the will of the Nation expressed through Congress?
>
> If so, we have made but little progress in consolidating the American people into a Nation . . . .[889]

California argued forcefully from social contract and consent principles that Chae Chan Ping's residence in the United States was "a privilege permitted to be enjoyed only so long as the U.S. continued [to be] so minded."[890]

> The Constitution and laws of the United States were adopted for the benefit of the people of the United States. Resident aliens have only such absolute rights as the public law of Nations secures to them, which rights are of imperfect obligation. Non-resident aliens have no rights at all, save what we choose to accord to them.[891]

The argument flatly ignored the Court's holding in *Yick Wo* that aliens within U.S. jurisdiction were entitled to the Constitution's protections.

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885. Argument of John F. Swift and Stephen M. White, of Counsel for Respondent Concurred in by G.A. Johnson, Attorney Gen., Cal., at 3, *Chae Chan Ping* (No. 1446).

886. *Id.* at 6.

887. *Id.* at 16.

888. The state contended:

> [I]t is futile to deny, that the same Congress could have passed at the same session an act requiring him, in common with any or all other aliens, to depart with or without notice or in a time given, or peremptorily, and to have him, as an alien, finally thrust across the frontier and expelled, if necessary. The greater power must surely include the lesser. If he could be sent away after coming, he can be kept out.

Id. at 4–5.

889. *Id.* at 7–8 (emphasis added). I am grateful to Gerry Neuman for bringing this argument to my attention.

890. *Id.* at 11–12.

891. *Id.* at 8.

The state finally disputed the plaintiff's claim of a vested right to return. The Certificate was "nothing more than a photograph," issued, not with the intent to establish a right to return, but "because the bad character of Ping's countrymen made it necessary to provide a moderately certain means of identification."[892]

Although the Court had rejected the United States' suggestion of inherent powers five years before in the *Head Money Cases*, Justice Field now embraced the broadest version of California's inherent powers argument. Writing for a unanimous Court, Field opened his opinion with an overtly nativist and ascriptivist explanation of the government's efforts to regulate Chinese immigration. The Chinese, Field wrote, while originally welcomed, had refused to assimilate.[893] Despite treaty provisions giving them the privileges of citizens,

> they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China . . . great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration.[894]

Chinese immigration constituted "an Oriental invasion," and "a menace to our civilization."[895] "[T]hey retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state."[896] Congress accordingly had acted in response to "urgent and constant prayers for relief, against existing and anticipated evils."[897]

Field invoked international principles of territoriality to assert the nation's absolute authority to prevent people from entering its borders. Like the Solicitor General, Field invoked *The Schooner Exchange* for the proposition of absolute sovereignty over U.S. territory:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. . . .

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892. *Id.* at 13–14.
893. *Chae Chan Ping*, 130 U.S. at 589–90.
894. *Id.* at 595.
895. *Id.*
896. *Id.* at 595–96.
897. *Id.* at 596.

> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the *consent of the nation itself.* They can flow from no other legitimate source.[898]

Having concluded that *international* law principles allowed the exclusion of aliens, however, Field did not address whether the constitutional structure imposed limitations on that power. International law did not resolve whether an exception to the power had been "imposed by . . . the nation itself." Without explaining how this particular power had been incorporated into the enumerated powers of the national government, Field assumed that the Constitution bestowed on the United States all the foreign relations powers of independent nations:

> [T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, [and] regulate foreign commerce . . . are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of civilized nations.[899]

This catalogue did not identify any particular enumerated power over immigration, but simply asserted that the national government possessed certain sovereign powers. Field, however, did not further consider the question, but assumed that the authority was held by the United States as a fundamental power of national security and self-preservation. The power to expel dangerous aliens was "too clearly within the essential attributes of sovereignty to be seriously contested."[900] Field embraced the United States' and California's argument that "vast hordes" of friendly aliens encroaching upon U.S. shores triggered the core national security powers of the state. Like Vattel, Field portrayed the right to exclude as essential to self-preservation:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the

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898. *Id.* at 603–04, (quoting The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)) (emphasis added).

899. *Id.* at 604, 606.

900. *Id.* at 607 (quoting communication from Mr. Fish, Secretary of State under President Grant, to Mr. Washburne, Minister to France (Sept., 1869)).

> occasion on which the powers shall be called forth .... If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other.[901]

While Field had sharply criticized the majority's suggestion of inherent national power in the 1884 *Legal Tender Cases*, he now invoked Justice Bradley's theory of sovereignty in an opinion that was both heavily nationalist and nativist.[902]

The Court did not expressly acknowledge the plaintiff's constitutional due process claim, despite the holding in *Yick Wo* and the suggestion in *Chy Lung* that the Constitution protected even newly arrived aliens from arbitrary treatment. Instead, Field simply denied that either the certificate or the statutes and treaties gave the plaintiff a right to reenter. Unlike property rights, which could vest by treaty, the immigration power was a political power and a core characteristic of sovereignty held by all nations which could not be granted away:[903]

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one .... They cannot be abandoned or surrendered .... Whatever license, therefore, Chinese laborers may have obtained, previous to the Act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure.[904]

Having established the first element of the inherent powers doctrine—a source of authority inherent in international law and sovereignty—Field also adopted the third element of limited judicial review, concluding that

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901. *Id.* at 606.

902. *Id.* at 605 ("[T]he United States . . . is a national government, and the only government in this country that has the character of nationality." (quoting Knox v. Lee, 79 U.S. (12 Wall.) 457, 555 (1872) (Bradley, J., concurring))).

903. *Id.* at 609.

904. *Id.*

Congress's exercise of the power to exclude was a political question which was "conclusive upon the judiciary."[905]

> The government . . . is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers . . . . If the [alien's] government . . . is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.[906]

In sum, the power derived from international law, and international relations between states provided the only remedy for its wrongful exercise.

Although Chae Chan Ping had argued that the case involved the expulsion of a lawful resident alien from within the nation's jurisdiction, Field characterized the case as one regarding *exclusion* of aliens outside of the nation's jurisdiction. The fiction that the case involved exclusion, not deportation, was important to his decision. Field specifically designated his opinion "The Chinese Exclusion Case"[907] and upheld "[t]he power of *exclusion* of foreigners [as] an incident of sovereignty belonging to the government of the United States."[908] Field carefully distinguished the 1798 Alien Act from the "exclusion" law at issue.[909] Field thus avoided California's contention that the powers to exclude and to expel were indistinguishable. Field's apparent discomfort with the Alien Act, and his insistence that the case involved the exercise of an entirely different power, confirm that he found the distinction between exclusion and expulsion significant.

Field's opinion also adopted the most absolute view of international authority over aliens, ignoring public law qualifications on the power, particularly regarding aliens who had established lawful residence. He declined to consider the petitioner's contention that whatever power existed under international law and the Constitution to exclude aliens did not extend to the expulsion of aliens, like the petitioner, who had established permanent residency in the territory. The decision, however, soon made its own contribution to international law. In 1891, the United Kingdom relied on Field's

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905. *Id.* at 606. *But see* LEGOMSKY, *supra* note 51, at 193 (arguing that the statement "undoubtedly meant only that the Court could not interfere because Congress had done nothing unconstitutional").

906. *Chae Chan Ping*, 130 U.S. at 606.

907. FISS, *supra* note 668, at 306–07 (noting that Field was careful to use the word "exclusion" without drawing a sharp distinction between exclusion and expulsion).

908. *Chae Chan Ping*, 130 U.S. at 609 (emphasis added).

909. *Id.* at 610–11 (noting that the 1798 Act had given the President power to order aliens "to depart out of the territory" and was "entirely different from the act before us").

portrayal of the international rule to uphold an absolute power to exclude returning alien residents.[910]

In sum, *Chae Chan Ping* radically transformed the Court's approach to the immigration power. Field made no effort to locate the immigration power in the Commerce Clause, and instead characterized the immigration power as an exclusive federal power incident to sovereignty, derived from the absolute sovereign right of all nations to deny aliens entry. The power was presumed to be incorporated into the general powers of the national government over foreign affairs and was not subject to judicial review. Although Field suggested nebulously that the Constitution restricted its exercise,[911] he did not acknowledge Chae Chan Ping's due process argument. The conclusion that all sovereign nations had authority to exclude aliens ended his examination of Chae Chan Ping's claims. It thus appeared that the exercise of the power was insulated—at least in the "exclusion" context—from due process objections.

Why was Field so willing to abandon the Commerce Clause analysis? Field's personal frustration with the Court's prior responses to Chinese immigration was both extreme and palpable. His experience as a presidential candidate from California and his longstanding service as a California circuit justice may have made him sympathetic to California's argument. Field's anger, however, does not explain the unanimity of the Court's decision. Some commentators have suggested that by 1889, post-Civil War notions of humanity made the Court uncomfortable with portraying voluntary immigration as "commerce."[912] However, the greatest controversy on the Court over designating immigration as "commerce" occurred in the ante-bellum period, as discussed above. The post-Civil War Court had expressed no discomfort with the issue and had uniformly embraced immigration as foreign commerce.[913]

More likely, as with the decision in *Kagama* three years earlier, the Court may have concluded that the power being upheld was too broad to justify under the Commerce Clause. At the same time that the national government was seeking more expansive powers over Indians and aliens in the name of Indian and foreign commerce, the Court was narrowing the

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910. Musgrove v. Chun Teeong Toy, 1891 A.C. 272, *quoted in* Nafziger, *supra* note 581, at 828–29 ("No authority exists for the proposition that an alien has [a legal right to enter British territory] . . . [or to] maintain [such] an action in a British Court . . . ."). Canada, Australia, and New Zealand likewise adopted exclusion legislation targeting the Chinese in the late nineteenth century. *Id.* at 816.

911. *Chae Chan Ping*, 130 U.S. at 604.

912. Henkin, *supra* note 51, at 856; *see also* Bilder, *supra* note 670, at 819, 822. *But see* LEGOMSKY, *supra* note 51, at 186 n.42 (suggesting that the Court's retreat from the Commerce Clause may have been motivated by its narrowing construction of that clause).

913. The Court's desire to distance immigration from the slavery question, however, may well have contributed to its prior rejection of the Migration Clause as the source of the immigration power.

scope of the domestic Commerce Clause. In particular, the 1888 decision of *Kidd v. Pearson*[914] stressed the limited reach of the federal commerce authority. The commerce power did not include the regulation of manufacture, the Court reasoned, and to extend the power beyond regulation of goods that had been loaded for interstate conveyance would invest Congress with the power to regulate "every branch of human industry" at the expense of the states.[915] The same year the Court acknowledged that the powers of interstate and foreign commerce were "undoubtedly of the same class and character and equally extensive."[916] The Court's constraints on the Interstate Commerce Clause would soon peak with the 1895 decision in *United States v. E.C. Knight*.[917]

In *Chae Chan Ping*, the de facto and retroactive exclusion of a lawful resident was less obviously related to commerce than a head tax on newly arriving aliens. Moreover, the immigration power was being used here not merely to preclude state action, but to nullify prior federal activity. In order to rule for the United States, therefore, the Court had to uphold Congress's abrogation of the treaty with China, the power to forbid new arrivals, and the revocation of a legal resident's certificate. At the same time that the Court was narrowing federal power under the Commerce Clause, it was aggressively protecting property and contract rights in other contexts. The Court had acknowledged as recently as the *Head Money Cases* that treaties could establish legally vested rights for private individuals,[918] and if Chae Chan Ping was correct that his right to return under the treaty and prior statutes was analogous to contract or property rights, he was likely to prevail. If the power to exclude had been merely a power of commerce, it might have been hard to deny that Chae Chan Ping's interests had vested. Alternatively, to hold that they did not vest might have given strength to the Commerce Clause that would prove unpalatable in the interstate commerce context. By portraying immigration as a core sovereign power that could not be alienated, therefore, Field was able to reject Chae Chan Ping's contention that the certificate constituted an irrevocable promise without distorting the commerce power. Thus, as in *Kagama*, when the Court was confronted with an exercise of national power deemed beyond the scope of the Commerce Clause, it turned, on arguments of necessity, to a theory of inherent power.

2. Nishimura Ekiu v. United States.—*Chae Chan Ping*'s *sub silentio* rejection of the plaintiff's due process claim was soon made express in the

914. 128 U.S. 1 (1888) (upholding a state statute prohibiting alcohol manufacture for export).

915. *Id.* at 21, 25.

916. Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 480, 482 (1888).

917. 156 U.S. 1 (1895); *see infra* notes 1701–14, 1783–83, and accompanying text.

918. The Head Money Cases, 112 U.S. 580, 598 (1884) ("A treaty may also contain provisions which confer certain rights upon the citizens or subjects of [the other nation].").

1892 case of *Nishimura Ekiu v. United States*.[919] *Nishimura Ekiu* was not a Chinese exclusion case, but arose under the general immigration statutes which authorized immigration commissioners to bar any individuals deemed likely to become a public charge.[920] An 1891 Act, which became effective during her detention, provided that all decisions by immigration inspection officers regarding the rights of aliens to land would be final, subject only to very limited administrative appeal.[921] Nishimura Ekiu was a Japanese national who came to the U.S. seeking her husband and had been excluded under the statute without being given the opportunity to present evidence of her entitlement to land.[922] *Nishimura Ekiu* thus actually presented the case that Justice Field had claimed he was deciding in *Chae Chan Ping*—the exclusion of a newly arriving alien, who had not entered U.S. territory and had no claim of membership. Nishimura did not challenge Congress's abstract power to exclude, but questioned only whether Congress's dedication of the power to the executive's unreviewable discretion was consistent with habeas and due process.[923] As in *Yick Wo*, Nishimura argued that due process protects all "persons" within U.S. jurisdiction.[924] *Chy Lung* similarly had involved the exclusion of a newly arriving alien through arbitrary processes, and the Court's decision in that case, as well as *Yick Wo*, suggested that the Court should be skeptical of arbitrary discretion.

The brief for the United States relied on citations from Vattel, Phillimore, and *Chae Chan Ping* to argue that the government had the power to exclude aliens.[925] No constitutional source of the authority was offered. With respect to the Constitution's constraints, the United States argued that the exclusion procedure was consistent with due process and then contended, from strict territoriality and membership theory, that Nishimura was not

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919. 142 U.S. 651, 659–60 (1892).

920. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214 *see supra* notes 791–93 and accompanying text. While Nishimura's habeas petition was pending, the immigration inspector upheld her exclusion based on a later statute. Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084 (amending various acts concerning immigration and importation of immigrant laborers).

921. Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085–86, *quoted in* Brief for the Appellees at 6–7, Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (No. 1393).

922. *Nishimura Ekiu*, 142 U.S. at 656; *see also* Brief for the Appellants at 12, *Nishimura Ekiu* (No. 1393) (arguing that Nishimura was 25 years old, in good health, and with sufficient money to support herself until she found employment).

923. Brief for the Appellants at 6–7, *Nishimura Ekiu* (No. 1393).

924. Appellant's argument relied in part on the plain text of the Constitution:

> The Constitution does not say that no *citizen* or *resident* shall be deprived of life, liberty or property without due process of law, but that no *person* shall be deprived of . . . due process . . . . Person is broad enough to include every human being within the jurisdiction . . . . The petitioner on board of a ship tied up to the wharf in the port of San Francisco, is within the jurisdiction of the United States, and is one of those persons mentioned in the 5th and 14th Amendments . . . .

Id. at 17.

925. Brief for the Appellees at 14–17, *Nishimura Ekiu* (No. 1393).

entitled to due process protections because she was an alien outside the United States. "The Constitution has no application to the appellant any more than it has to any other foreigner,"[926] the government urged. Citing the strict territoriality case of *In re Ross*,[927] the government contended, "The Constitution is limited by its nature and purposes and by the terms of its preamble to the people and the territory of the United States."[928] Nishimura was "not to be considered as a person lawfully within the United States . . . or even as landed upon its shores."[929] Although she had been moved to a detention site in San Francisco, she was "constructively and in legal view on board the *S.S. Belic*, in the port of San Francisco, claiming that she has the right to land."[930] Ignoring the fact that the Due Process Clause is not limited to citizens, the government argued that the doctrine that aliens at the border could demand "the privileges and immunities given to citizens" by the Constitution was "preposterous."[931]

In an eight-to-one opinion by Justice Gray, the Supreme Court upheld Nishimura's exclusion.[932] Justice Gray opened with an expansive statement of sovereign power over immigration:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe . . . . In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations . . . .[933]

As in *Chae Chan Ping*, the power to exclude was treated as an undisputed principle of international law, "inherent in sovereignty" and "essential to self-preservation," which "belong[ed] to the political department of the government."[934]

The Court conceded that aliens prevented from landing were deprived of liberty and entitled to review under a writ of habeas corpus.[935] However, Gray held that for aliens who had not yet entered the United States, a court was entitled to inquire into the facts on habeas only if the statute so

926. *Id.* at 13.

927. *In re* Ross, 140 U.S. 453 (1891); *see infra* notes 1380–93 and accompanying text.

928. *In re* Nishimura Ekiu on Habeas Corpus, Appellee's Brief at 13, *Nishimura Ekiu* (No. 1393).

929. *Id.* at 2.

930. *Id.* Congress had provided that the removal and detention of aliens for inspection purposes "shall not be considered a landing." *Id.* at 9 (quoting section 8 of the March 3, 1891 Act).

931. *Id.* at 12.

932. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

933. *Id.* (citing VATTEL, *supra* note 56, bk. II, §§ 94, 100; 1 PHILLIMORE, *supra* note 588, ch. 10, § 220).

934. *Id.*

935. *Id.* at 660.

authorized. In Nishimura's case, due process had not been violated, and habeas review of the facts found by the commissioner was not allowed. The Court thus embraced the government's membership and territoriality arguments to justify the exercise of an absolute political right to exclude aliens at the border:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of the executive [and Congress], are due process of law.[936]

Justice Brewer, who had been appointed to the Court in 1890, dissented without opinion.

Nishimura Ekiu thus confirmed the scope of the inherent powers doctrine by dedicating near absolute discretion over entry decisions to Congress and the executive. All three elements of the inherent powers doctrine had now been articulated. The source of authority was inherent and derived from international law. Individual rights protections such as due process would not be applied to constrain that power, and judicial review would be authorized only to review questions of law and fact to the extent provided for by those bodies.[937] The question that remained unanswered was the scope of federal power over persons who satisfied threshold membership and territoriality concerns—i.e., long-term legal residents who were present in the United States.

3. Fong Yue Ting v. United States.—In May 1892, Congress passed the Geary Act,[938] which extended the 1882 suspension of Chinese immigration for another ten years.[939] The Act further required all lawful resident Chinese laborers to carry a certificate of residence at all times, based on the testimony of a white witness, and imposed a one-year deadline for Chinese laborers to register.[940] Chinese found without a certificate would be subject to deportation unless they could establish to a reviewing court, through the

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936. *Id.*

937. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1008–10 (1998) (discussing *Nishimura Ekiu*).

938. Act of May 5, 1892, ch. 60, 27 Stat. 25, 60.

939. *Id.* § 1.

940. *Id.* § 6. The Aet did not specifically define what proof of residence was required to obtain a certificate, *id.*, but regulations promulgated under the Act provided that residence must be proved by "at least one credible witness of good character" or by other proof in case of necessity. Fong Yue Ting v. United States, 149 U.S. 698, 726 (1893). The requirement was interpreted as requiring proof through at least one white witness. *See* SALYER, *supra* note 769 at 47 (noting that as the deadline for registering approached, the Secretary of the Treasury reduced the white witness requirement from two to one).

testimony of a "credible white witness," that they had been a resident of the United States upon the Act's passage and that "by reason of accident, sickness or other unavoidable cause" they had been unable to procure a certificate.[941] The Geary Act thus was the first expulsion measure adopted since the 1798 Alien Act. The Act underscored the inferior status of the Chinese, even to other immigrants, by singling them out for a pass-law requirement.[942]

The Geary Act's specific targeting of resident Chinese provoked a massive campaign of civil disobedience within the Chinese community.[943] Confident after their victory in *Yick Wo* and on the advice of a team of elite legal counsel,[944] the Chinese Six Companies condemned the law as inhumane and unconstitutional and called upon Chinese not to register. The campaign was wildly successful: by the registration deadline, 13,242 Chinese in the United States had registered, leaving approximately 85,000 who were legally subject to deportation under the Act.[945] Meanwhile, the Chinese Six Companies brought a test case challenging the constitutionality of the Geary Act. Due no doubt in part to the prohibitive cost of enforcement, the Secretary of the Treasury suspended enforcement of the law while the court case was pending.[946]

The Chinese community's challenge to the Geary Act, *Fong Yue Ting v. United States*,[947] involved three plaintiffs, each of whom had been a lawful resident of the United States for more than ten years. The first two petitioners, Fong Yue Ting and Wong Quan, had declined to apply for certificates and were arrested in New York and ordered deported. The third petitioner, Lee Joe, who had been a U.S. resident for nearly twenty years, had applied for a certificate of residence, but had been able to present only Chinese witnesses to attest to his residency. Lee Joe satisfied the court that he had been a resident of the United States at the time of the 1882 Act's passage, but he was ordered deported for failure to produce a white witness.

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941. Act of May 5, 1892, ch. 60, § 6, 27 stat. 25, 60.

942. In the Senate debates, Senator Sherman of Ohio criticized the Act, stating: "They are here ticket-of-leave men; precisely as, under the Australian law, a convict is allowed to go at large upon a ticket-of-leave, these people are to be allowed to go at large and earn their livelihood, but they must have their tickets-of-leave in their possession." "This inaugurates in our system of government a new departure; one, I believe, never before practiced, although it was suggested in conference that some such rules had been adopted in slavery times to seeure the peace of society." *See Fong Yue Ting*, 149 U.S. at 743 (Brewer, J., dissenting).

943. *See* Katz, *supra* note 777, at 253–63 (discussing Chinese opposition to the Geary Act).

944. The Six Companies hired some of Washington, D.C.'s preeminent appellate attorneys—J. Hubley Ashton (counsel for the Southern Pacific Company), Joseph Choate, Maxwell Evarts, and James Carter—to evaluate the legality of the Geary Act and, ultimately, to bring a legal challenge. SALYER, *supra* note 769, at 47. *See* FISS, *supra* note 668, at 304 & n.34.

945. 25 CONG. REC. 2421 (1893).

946. *See* H.R. REP. NO. 53-70, at 2 (1893) (noting that the arrest and deportation of the 85,000 noncompliant Chinese would cost an estimated $6 million).

947. 149 U.S. 698 (1893).

All three aliens unsuccessfully sought habeas relief from the Circuit Court in the Southern District of New York.

Justice Field's decision in *Chae Chan Ping* had avoided the question of Congress's constitutional power to deport lawful residents by treating the plaintiff as a new entrant. But *Fong Yue Ting* now squarely presented the Alien Act controversy regarding the scope of congressional authority over friendly resident aliens and their entitlement to constitutional protection in expulsion proceedings. The plaintiffs' arguments closely tracked the Jeffersonian, limited-government and individual rights position from the Alien Act debates.[948] Plaintiffs first attacked Congress's source of authority, contending that the Framers had not delegated to Congress any power to remove friendly resident aliens (except as punishment for a crime).[949] In particular, the plaintiffs denied that the power was implied in the Commerce Clause, arguing that the appellants had been in the United States as permanent residents for many years, and their expulsion had nothing to do with foreign commerce.[950] To the contrary, the plaintiffs contended that the Constitution incorporated an affirmative policy to encourage immigration and that the Tenth Amendment reserved the power to expel friendly aliens to the people.[951]

Plaintiffs further rejected the contention that the United States enjoyed any "inherent power of sovereignty" under the Constitution.

> [T]he appellants therefore claim that there is no such thing as an inherent power of sovereignty resting in Congress, that is not conferred upon it by the Constitution. Before Congress has the power to pass a law, that power must be found in the Constitution, either expressly stated or given by implication, and no law passed by it can be sustained on the sole ground that it is passed under an inherent power of sovereignty, that it is necessary to the preservation of the nation, or an incident of sovereignty. All such powers are still in the people . . . .[952]

Plaintiffs rejected any analogy to the powers of England, arguing that the United States was a limited government "made up of responsible and delegated power."[953]

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948. Brief for Petitioners at 45–47, *Fong Yue Ting* (No. 1345).

949. *Id.* at 17–19.

950. *Id.* at 52. *See also id.* at 54 (arguing that "when immigrants have ceased to be immigrants, and have been transformed into an integral part of our own population, with the same constitutional rights to personal liberty as native-born citizens, they have escaped beyond the reach of the Commerce Clause").

951. *Id.* at 26. *See also id.* at 18–19 (noting that ultimate sovereignty in the United States rests with the people).

952. *Id.* at 19.

953. *Id.* at 22.

The plaintiffs also urged that international law supported their interpretation. A country that invited and admitted an alien as a permanent resident "preclude[d] itself, according to the practices of civilized nations, from dismissing him from its borders, except on the ground that it is at war with his nation of origin or as a punishment for a crime."[954] St. Ambrose and Grotius had believed that a country had no right to exclude a lawfully admitted foreigner, even to save the domestic population from starvation.[955] Moreover, the plaintiffs argued, the expulsion of such a large class of resident aliens in time of peace was contrary to the practices of civilized nations and had never been attempted by a civilized government in modern history.[956]

Having rejected the Constitution as a source of authority, the plaintiffs contended that even if Congress had a power to expel, the Constitution's individual rights protections limited its exercise. They argued from *Yick Wo* that as aliens lawfully present in the United States, they were entitled to the same constitutional privileges and immunities as citizens.[957] For the first time since *Yick Wo*, the plaintiffs criticized the law as racially discriminatory and argued that the Due Process Clause protected the right of resident aliens to live and labor where they chose within the limits of U.S. territory.[958] The plaintiffs quoted at length from *Chy Lung*'s condemnation of arbitrary, unreviewable authority[959] and urged that likewise here, "the power given . . . depends entirely upon the whim, the caprice and the honesty of each partieular Collector of Internal Revenue."[960] Reviewing courts had no authority to determine whether the alien actually satisfied the law's requirements, and "the judicial determination of the most sacred of all rights is left to a wholly unqualified ministerial officer."[961] This due process objection was essentially the same as that advanced in *Nishimura Ekiu*, except that here the aliens in question were lawful U.S. residents. Regardless of whether Congress justified its action under powers inherent in sovereignty or a power under the Constitution, the plaintiffs urged, "the procedure by which the expulsion is accomplished must be according to 'due process of law.'"[962]

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954. *Id.* at 41.

955. *Id.* (citing PUFENDORF, *supra* note 579, bk. III, ch. III, § 9).

956. *Id.* at 15.

957. *Id.* at 12–13. *See also id.* at 75 ("Each one of the first eight amendments . . . was ordained by the people for the benefit of every person within thc limits of the United States.").

958. *Id.* at 54.

959. *Id.* at 66–67.

960. *Id.* at 68.

961. *Id.* at 61.

962. *Id.* at 63.

Plaintiffs additionally maintained that the proceedings, including the white witness requirement, violated the Fourth Amendment prohibition against warrantless arrest, the Fifth Amendment right to a grand jury, and the Sixth Amendment rights to criminal process and trial by jury.[963] Plaintiffs further argued that aliens subject to deportation were denied any opportunity to gather up their property and settle their affairs, thus depriving them of property without due process.[964]

As it had in *Chae Chan Ping*, the United States, in turn, invoked the Federalist Alien Act theories of the territorial sovereignty of states under international law, and aliens' non-membership in the constitutional compact, to assert that even resident aliens enjoyed no constitutional protection against the national government. The Solicitor General offered lengthy international law citations for the proposition that every nation had a right both to set the terms upon which aliens would be admitted to its territory, and to suspend such residence and require that they depart.[965] Any limitation other than international law on the power to expel, the government argued, would deny the U.S. control over its membership, and mean "that other sovereign nations may . . . *plant colonies upon our shores foreign in allegiance as well as citizenship*."[966] Notably, the United States invoked power over Indians in support of its argument. The forced removal of the Indians from the eastern United States confirmed this national authority, since Indians were "regarded as aliens" for this purpose.[967]

Non-membership was a prominent theme for the government. The Solicitor General's brief was riddled with nativist sentiment and hostility toward the Chinese litigants.[968] Like past "hordes of barbarians,"[969] the "Mongolians [were] practically incapable of assimilation with our people. They [came] as a foreign element, and they remain[ed] as such."[970] Their strangeness created a pressing national security concern. Indeed, "the most insidious and dangerous enemies to the State," the government argued, "are not the armed foes who invade our territory, but those alien races who are

963. *Id.* at 71.

964. *Id.* at 83.

965. Brief for Respondents at 22, Fong Yue Ting v. United States 149 U.S. 698 (1893) (No. 1345). In addition to citing Phillimore and Vattel, the United States invoked Creasy, Lorimer, Woolsey, and Reddie. *Id.* at 23–27.

966. *Id.* at 41 (cmphasis added).

967. *Id.* at 30.

968. *Id.* at 12 (describing the Chinese as "a large class of people owing allegiance to a foreign sovereign, by a people not suited to our institutions, remaining a separate and distinct race, incapable of assimilation, having habits often of the most pernicious character, working at wages that debasc our own laboring classcs, not bound by any considerations of the sanctity of an oath, given to evasions of other laws of Congress, and by that body . . . declared to be a people of such a character and so inimical to our interests as to require that their coming shall be prohibited").

969. *Id.* at 55.

970. *Id.* at 18.

incapable of assimilation, and come among us to debase our labor and poison the health and morals of the communities in which they locate."[971]

The government sought to distinguish *Yick Wo* as involving the right of aliens to invoke the Constitution against the States. By contrast, aliens could not "appeal to the Federal Constitution for protection against the Federal Government itself."[972] At any rate, the exercise of the power was "beyond the province of the judiciary."[973] Turning the tables on Field's treatment of *Chae Chan Ping* as an exclusion case, the government argued that because Chae Chan Ping had been a long-term lawful resident, the legal issues had already been decided in that case.[974] Finally, the government urged that the power was "political in its character, and for its exercise the nation can not be called to account in judicial tribunals."[975]

For the first time since the Civil War, the Supreme Court significantly divided over Congress's authority over aliens. The Court upheld the statute in a five to three opinion by Justice Gray, with Justices Brewer, Field, and Chief Justice Fuller dissenting.[976] Justice Gray opened the opinion by repeating at length the Court's assertions of sovereign power over immigration from *Chae Chan Ping* and *Nishimura Ekiu*, and he concluded that the power to expel "rests upon the same grounds."[977] They were "but parts of one and the same power."[978] Gray offered the government's lengthy citations to international law treatises in support of the power—citations which, as Justice Field pointed out in dissent, stood at most for the power to *exclude*, not the power to expel resident aliens.[979] Nevertheless, Gray concluded, "The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."[980]

While Field had relied on the fiction that *Chae Chan Ping* was an exclusion case, Gray now bootstrapped *Chae Chan Ping* to uphold the deportation of alien residents. Gray noted that *Chae Chan Ping* unanimously had upheld the power of Congress to exclude a long-term resident of the United States "without judicial trial or hearing."[981] That decision foreclosed

971. *Id.* at 55.

972. *Id.* at 40; *see also id.* at 44 (arguing that a Chinese alien is not entitled to invoke the Constitution against the police power of the United States).

973. *Id.* at 32.

974. *Id.* at 42.

975. *Id.* at 54.

976. Justice Harlan did not participate in the consideration of the case.

977. *Fong Yue Ting*, 149 U.S. at 707.

978. *Id.* at 713.

979. *Id.* at 745–46 (Field, J., dissenting).

980. *Id.* at 711.

981. *Id.* at 723.

the possibility of holding "that a Chinese laborer acquired . . . any right . . . to be and remain in this country, except by the license, permission and sufferance of Congress, to be withdrawn, whenever, in its opinion, the public welfare might require it."[982] Thus, because Field had treated *Chae Chan Ping* as an exclusion case, and Gray treated that case as having already decided the issue of expulsion, the Court simply avoided ever considering the international law rules regarding expulsion of long-term lawful residents.

Unlike the decisions in *Chae Chan Ping* and *Nishimura Ekiu*, which had at least mentioned the Constitution, Gray's argument that Congress had the power to exclude relied solely on principles of international law and English practice and made no attempt to locate the immigration power in any specific clause of the Constitution, or even in the Constitution generally. He simply asserted summarily that "[t]he constitution of the United States speaks with no uncertain sound on this subject."[983]

Gray next rejected the plaintiffs' individual rights claims. The Court did not embrace the government's extreme position that the constitutional protections recognized in *Yick Wo* did not apply against the federal government. Instead, the Court distinguished *Yick Wo* by holding that constitutional protections attached to aliens, "*so long as they are permitted by the government of the United States to remain in the country.*"[984] These safeguards included "their rights of person and of property, and . . . their civil and criminal responsibility."[985] They did not, however, limit the power of Congress to withdraw its permission at any time.[986] This reasoning was in tension with *Chy Lung*, which had applied equal protection principles to a state *exclusion* law. Gray explained away *Chy Lung*, however, by asserting that it had simply found that a state immigration statute contravened Congress's immigration power.[987] In any event, the Court suggested that because deportation was not punishment,[988] and because the white witness rule was consistent with other procedural practices,[989] the Due Process Clause was not violated.[990]

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982. *Id.* at 723–24.

983. *Id.* at 711.

984. *Id.* at 724 (emphasis added). *See also id.* at 725 (reasoning that *Yick Wo* had involved "the power of a state over aliens continuing to reside within its jurisdiction, not . . . the power of the United States to put an end to their residence in the country").

985. *Id.* at 724.

986. *Id.* ("[T]hey continue to be aliens . . . and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment their removal is necessary or expedient for the public interest.").

987. *Id.*

988. *Id.* at 730.

989. *Id.* at 729–30 (finding that the white witness requirement was both within the power of Congress and consistent with the naturalization laws' requirement of testimony by a U.S. citizen).

990. *Id.* at 730 ("[The alien] has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury,

The Court finally asserted that immigration was a political question not subject to review. Like Justice Field in *Chae Chan Ping*, Gray viewed "[t]he question whether, and upon what conditions, these aliens shall be permitted to remain within the United States [as] one to be determined by the political departments."[991]

The extension of the *Chae Chan Ping* doctrine to permanent lawful residents apparently was too much for Field, who, together with Brewer and Chief Justice Fuller, now vociferously dissented from the Court's opinion. The three dissenters all strenuously objected to the majority's inherent powers argument and contended that, whatever the national government's authority over entering aliens, ordinary constitutional principles must apply to alien residents.[992] The dissenters asserted enumerated powers-limited government visions of national authority strongly reminiscent of the Jeffersonian position in the Alien Act debates.

Field rejected the application of his own analysis in *Chae Chan Ping* to the deportation of lawfully admitted aliens, and he sharply distinguished between entering and resident aliens.[993] The dissenters generally agreed with this distinction. For Brewer, the distinction turned in part on principles of strict territoriality:

> The constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions .... But the constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument.[994]

Fuller also distinguished between the United States' internal and external powers.[995]

The logical implication of this territoriality distinction was that aliens *within* U.S. territory were fully entitled to the Constitution's protection.

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and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.").

991. *Id.* at 731. Given Gray's apparent conclusion that due process was not violated, this statement may simply constitute an observation that a court would not interfere with powers exercised consistent with the Constitution.

992. *Id.* at 733–34 (Brewer, J., dissenting); *id.* at 755–56 (Field, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting).

993. *Id.* at 746 (Field, J., dissenting) ("[B]etween legislation for the exclusion of Chinese persons—that is, to prevent them from entering the country—and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference.").

994. *Id.* at 738 (Brewer, J., dissenting).

995. *Id.* at 762 (Fuller, C.J., dissenting) (arguing that while the United States was "invested, in respect of foreign countries and their subjects or citizens, with the powers necessary to the maintenance of its absolute independence and security throughout its entire territory," these broad powers did not justify arbitrary treatment of persons "lawfully within the peace of its dominions").

Thus, even if the national government enjoyed power to deport resident aliens, that power could "be exercised only in subordination to the limitations and restrictions imposed by the Constitution."[996] Here Brewer asserted a classic limited government theory, arguing that the Bill of Rights was adopted to prevent abuse of national authority, and that the language of the amendments was not limited to citizens but broadly embraced "people" and "persons."[997] *Yick Wo* had confirmed that the Fourteenth Amendment preserved "to any person within [U.S.] jurisdiction the equal protection of the laws,"[998] and U.S. governmental institutions did not leave room for "purely personal and arbitrary power."[999] Brewer noted that congressional exercise of the commerce power was limited by the Fifth Amendment Takings Clause, "[a]nd, if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication."[1000] In *Yick Wo*, Brewer ironically observed, "this court saw no difficulty in finding a constitutional barrier . . . . But this greater wrong, by which a hundred thousand people are subject to arrest and forcible deportation from the country, is beyond the reach of the protecting power of the constitution."[1001] The Chinese being deported had lived in the country, he noted, "almost as long a time as some of those who were members of the congress that passed this act of punishment and expulsion."[1002]

Field had authored the 1891 territorial decision in *In re Ross*, which emphasized a strict territoriality view of the Constitution's application,[1003] and he also emphasized that the Constitution "extends protection to all persons within its jurisdiction."[1004] But in contrast to Brewer, Field here relied more on theories of membership to find that an alien, once lawfully admitted with the community's consent, was entitled to the Constitution's protection:

> Aliens from countries at peace with us, *domiciled within our country by its consent*, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens. The moment any human being from a country at peace with us comes

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996. *Id.* at 738 (Brewer, J., dissenting).

997. *Id.* at 739 (Brewer, J., dissenting).

998. *Id.* (Brewer, J., dissenting) (quoting Yiek Wo v. Hopkins, 118 U.S. 356, 369 (1886)). *See also id.* at 761 (Fuller, C.J., dissenting) (arguing that due process in the Fifth and Fourteenth Amendments are "universal in their application to all persons within the territorial jurisdiction" (quoting *Yick Wo*, 118 U.S. at 369)).

999. *Id.* at 742 (Brewer, J., dissenting) (quoting *Yick Wo*, 118 U.S. at 369).

1000. *Id.* at 738 (Brewer, J., dissenting).

1001. *Id.* at 744 (Brewer, J., dissenting).

1002. *Id.* at 734.

1003. 140 U.S. 453 (1891). *See infra* notes 1391–92 and accompanying text.

1004. *Fong Yue Ting*, 149 U.S. at 755 (Field, J., dissenting) (quoting an unpublished passage from Ho Ah Kow v. Nunan, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,546) (Field, Circuit Justice)).

> within the jurisdiction of the United States, *with their consent—and such consent . . . in the case of the Chinese laborers before us, was, in terms, given by the treaty . . .* —he becomes subject to all their laws, is amenable to their punishment, and entitled to their protection . . . . To hold that they are subject to any different law . . . is in my judgment to ignore the teachings of our history, the practice of our government, and the language of our Constitution.[1005]

The implications of Field's membership argument were potentially narrower than Brewer's limited government theory. Brewer's approach, which rested on territoriality, would apply the Constitution equally to all persons present in the jurisdiction, while Field's membership analysis limited constitutional protections to lawful aliens to whose presence the nation had consented.[1006]

Field now clarified his ambiguous reference to the Alien Act at the end of *Chae Chan Ping* by discussing at length the debates surrounding the Alien Act and the effects of deportation that Field had ignored in the earlier case. Even the Alien Act, Field contended, "was defended by its advocates as a war measure" and did not support any power to expel aliens in time of peace.[1007] Moreover, the Alien Act had been widely denounced "as unconstitutional and barbarous."[1008] "In no other instance, until the law before us was passed," Field contended, "has any public man had the boldness to advocate the deportation of friendly aliens in time of peace."[1009]

The dissenters also denied that the United States possessed any power under the Constitution or international law to expel resident aliens. Both Field and Brewer embraced the plaintiffs' assertion that they were denizens and that the law of nations had long recognized that aliens domiciled in a country were entitled to greater protections.[1010] Field noted that both the Court's prior decisions and the international law treatises cited by the majority "all have reference to the *exclusion* of foreigners from entering the country. They do not touch upon the question of deporting them from the country after they have been domiciled within it by the consent of its government . . . ."[1011]

Nevertheless, both Brewer and Field ultimately urged from classic enumerated powers principles that it was an alien's status under the

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1005. *Id.* at 754 (Field, J., dissenting) (emphasis added).

1006. *Id.* at 760 (Field, J., dissenting) ("I cannot but regard the decision as a blow against constitutional liberty, when it declares that Congress has the right to disregard the guaranties of the Constitution intended *for the protection of all men, domiciled in the country with the consent of the government.*").

1007. *Id.* at 747, 748–50 (Field, J., dissenting).

1008. *Id.* at 747 (Field, J., dissenting).

1009. *Id. See also id.* at 746 (Field, J., dissenting) (asserting that prior to the Alien Act, the government had no power to deport persons lawfully domiciled in the country with the country's consent).

1010. *Id.* at 736–37 (Brewer, J., dissenting).

1011. *Id.* (Field, J., dissenting) (emphasis added).

Constitution, not international law principles, that was controlling. Whatever the practices of despotic nations recognized under international law, these powers had not been incorporated into the limited, delegated powers of the national government. "[E]ven if that power were exercised by every government of Europe, it would have no bearing on these cases," Field wrote. "It may be admitted that the power has been exercised by the various governments of Europe .... [But] no power to perpetrate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the Constitution."[1012]

All three dissenters invoked enumerated powers principles to attack the inherent powers doctrine. Fuller bemoaned the majority's "assertion of an unlimited and arbitrary power, ... in conflict with the written Constitution by which that government was created."[1013] Brewer likewise voiced concern at the implications of the doctrine:

> It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? ... The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers ... wisely ... gave to this government no general power to banish.[1014]

And Field now returned to the enumerated powers position from his *Legal Tender Cases* dissent:

> The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty .... Sovereignty or supreme power is in this country vested in the people, and only in the people. By them certain sovereign powers have been delegated to the government of the United States and other sovereign powers reserved to the states or to themselves. This is ... the express declaration of the Tenth Amendment to the Constitution, passed to avoid any misinterpretation of the powers of the general government .... When, therefore, power is exercised by Congress, authority for it must be found in express

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1012. *Id.* at 757 (Field, J., dissenting); *accord id.* at 737 (Brewer, J., dissenting) Justice Brewer argued that "whatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments. It has been repeated so often as to become axiomatic, that this government is one of enumerated and delegated powers," with the powers not delegated reserved to the states and the people.

1013. *Id.* at 764 (Fuller, C.J., dissenting).

1014. *Id.* at 737–38 (Brewer, J., dissenting).

> terms in the Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.[1015]

The consequences of the Court's contrary approach shocked the conscience:

> The existence of the power thus stated is only consistent with the admission that the government is one of unlimited and despotic power so far as aliens *domiciled in the country* are concerned. According to this theory, Congress might have ordered executive officers to take the Chinese laborers to the ocean and put them into a boat, and set them adrift; or to take them to the borders of Mexico, and turn them loose there; and in both cases without any means of support; indeed, it might have sanctioned towards these laborers the most shocking brutality conceivable.[1016]

The dissenters appeared motivated in part by the implications of the power for European immigrants.[1017] Brewer noted that the power was not limited to "the obnoxious Chinese"—a phrase he appears to have adopted sarcastically from the government's brief.[1018] "[I]f the power exists," Brewer asked, "who shall say it will not be exercised tomorrow against other classes and other people?"[1019]

Justice Field's radical departure from his *Chae Chan Ping* decision, and particularly his emphasis on the *Fong Yue Ting* plaintiffs' status as lawful residents, is difficult to reconcile with the fact that Chae Chan Ping also had been a long-term lawful resident. It may have been Chae Chan Ping's departure that made the "marked difference" to Field between the two cases, either because Chae Chan Ping was at the border, which triggered strict territoriality concerns, or because Field felt that Chae Chan Ping had abandoned his membership (as Field felt the appellant in *Chew Heong* had abandoned his). Field did not emphasize these points in *Chae Chan Ping*, however. Perhaps Field's change of heart was due to his realization of the severe implications of the inherent powers analysis for lawful residents. Or, perhaps, it reflected his oncoming senility. Whatever the basis for the distinction, Field was sufficiently outraged by the decision to suggest that

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1015. *Id.* at 757–58 (Field, J., dissenting).

1016. *Id.* at 755–56 (Field, J., dissenting) (emphasis added).

1017. "Is it possible," Field asked, "that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the *invitation* of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized?" *Id.* at 750 (Field, J., dissenting) (emphasis added).

1018. *Id.* at 743 (Brewer, J., dissenting). *See also* Brief for the United States at 49, *Fong Yue Ting* (No. 1345) (arguing that the Commerce Clause authorizes Congress to "exclude and deport obnoxious subjects of China, as well as obnoxious products of that country").

1019. *Fong Yue Ting*, 149 U.S. at 743 (Brewer, J., dissenting).

Congress should ask the Court to reconsider the issue, and he later urged that the Court be packed to ensure the "proper" result.[1020]

In sum, the decision in *Fong Yue Ting* extended the inherent powers rationale to the expulsion of lawfully resident aliens. While Field in *Chae Chan Ping* had suggested that the power derived from, and was limited by, the aggregate provisions of the Constitution, in *Fong Yue Ting* the Court confirmed that the power to exclude and expel derived from powers enjoyed by all sovereign states under international law. Its exercise apparently was neither limited by the Constitution nor subject to judicial review. The briefs before the Court demonstrate that the Court was fully presented with the competing arguments under international law but chose to reject them.[1021]

The *Fong Yue Ting* decision devastated the Chinese community. It also posed a serious problem for immigration authorities, who were now obligated to deport the vast majority of the nation's Chinese residents. The executive branch estimated that deportation of all the Chinese who had failed to register would cost $7,310,000, though the Treasury Department had only a $25,000 budget for the task.[1022] California farmers warned that the loss of Chinese laborers would destroy the region's agriculture.[1023] The United States assured the Chinese government that Congress would modify the legislation, and the McCreary Amendment of November 1893 extended the deadline for registering.[1024] In an effort to mollify the concerns of the Chinese government, in 1894 the United States entered into a Convention with China which again promised that "Chinese . . . either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens . . . excepting the right to become naturalized citizens."[1025]

4. Lem Moon Sing v. United States.—In 1894, Congress acted upon its newfound plenary power over immigration to strip the federal courts of jurisdiction to review most Chinese exclusion decisions.[1026] In the 1895 case of *Lem Moon Sing v. United States*,[1027] the Court upheld the jurisdictional bar while further elaborating on the inherent powers doctrine. *Lem Moon Sing*

1020. KENS, *supra* note 783, at 213; FISS, *supra* note 668, at 29 n.29, 312 n.67.

1021. Nafziger, *supra* note 581, at 824–28.

1022. 25 CONG. REC. H2422 (1893).

1023. Charles H. Shinn, *The Geary Act in California*, 56 NATION 365 (1893).

1024. SALYER, *supra* note 769, at 55–56 (explaining that the amendment allowed Chinese laborers an additional six months to register).

1025. Convention on Emigration between the United States of America and the Empire of China, Mar. 17, 1894, U.S.-China, 28 Stat. 1210, 1211.

1026. The statute provided in relevant part that "the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." Act of Aug. 18, 1894, ch. 301, 28 Stat. 390.

1027. 158 U.S. 538 (1895).

involved a habeas challenge by a Chinese permanent resident merchant who claimed exemption from the laws excluding Chinese laborers. Upon returning from a two-year trip to China, Lem Moon Sing was denied entry in San Francisco despite the testimony of two credible non-Chinese witnesses that he was a Chinese merchant lawfully residing in the United States. Lem Moon Sing contended that his exclusion violated due process and equal protection.[1028] He argued that although Congress had a right to give immigration officers power to exclude aliens not entitled to enter the United States, executive exclusion of those whose entry no law prohibited presented a question for judicial review.[1029]

Justice Harlan, who in the territory cases was one of the Court's most assertive proponents of the enumerated powers doctrine and individual rights, upheld the exclusion for an eight-to-one Court.[1030] After reviewing the Court's prior holdings that "according to the accepted maxims of international law, every sovereign nation has the power, inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions," Harlan concluded that the exercise of this power "belongs to the political department."[1031] Harlan viewed the power of Congress to exclude aliens without judicial intervention as settled by the prior decisions.[1032] Although while domiciled in the United States, the alien was protected by all the guarantees of life, liberty, and property secured by the Constitution, "he cannot reenter the United States in violation of the will of the government."[1033] The Court declined to consider whether the petitioner actually was legally entitled to enter the United States, finding that "that question has been constitutionally committed by congress to . . . the executive department."[1034] If the methods used to screen aliens de facto eliminated the legal right of an alien to reenter the country, "the authority of congress to do even that eannot be questioned."[1035]

H. The Competing Vision

Despite the decisions embracing the inherent powers doctrine between 1889 and 1894, the competing enumerated powers vision of the rights of aliens was not destroyed. As Lucy Salyer has carefully documented, lower federal courts during the 1890s continued to provide basic due process

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1028. *Id.* at 541.

1029. *Id.* at 546.

1030. Justice Brewer dissented without opinion.

1031. *Lem Moon Sing*, 158 U.S. at 543.

1032. *Id.* at 547.

1033. *Id.* at 547–48.

1034. *Id.* at 550. It is unclear whether the decision upheld the finality only of executive factual determinations or barred consideration of the legal scope of the exclusion laws as well. *See* Neuman, *supra* note 937, at 1012.

1035. *Lem Moon Sing*, 158 U.S. at 549.

protections to Chinese nationals in habeas corpus proceedings and consistently reversed collector determinations.[1036] *Yick Wo* also continued to be applied to protect the personal and property rights of aliens who were lawfully present in the country. But after *Fong Yue Ting*, it was unclear to what extent the courts would uphold the *Yick Wo* approach to constrain federal (as opposed to state) authority over aliens. As with Indians, the question of Chinese entitlement to natural-born citizenship under the Fourteenth Amendment also was percolating in the latter 1890s. Both of these questions were soon resolved in favor of constitutional protections for the Chinese, as the Court reaffirmed the enumerated powers-limited government approach. The decisions in *Wong Wing v. United States* and *United States v. Wong Kim Ark* crystallized the Court's distinction between recognizing constitutional protections for the persons and property of resident aliens and deferring to the government's decision to admit or expel immigrants.

1. Wong Wing v. United States.—The 1896 case of *Wong Wing v. United States*[1037] involved a constitutional challenge to section four of the Geary Act, which allowed aliens found unlawfully present in the United States to be sentenced without a jury trial to up to one year at hard labor prior to deportation. Wong Wing and other resident Chinese were arrested in Michigan, determined by the local United States Circuit Court Commissioner to be unlawfully within the United States, and ordered imprisoned for sixty days at hard labor prior to their deportation.[1038]

The petitioners argued on habeas that imprisonment at hard labor was punishment which had been imposed in violation of the Fifth Amendment rights to grand jury and due process, the Sixth Amendment right to jury trial, and the Thirteenth Amendment prohibition against involuntary servitude.[1039] Petitioners invoked *Yick Wo* to argue that these provisions applied to "any person," whether aliens or U.S. citizens.[1040]

The United States continued to maintain, as it had in *Fong Yue Ting*, that the Constitution applied only to aliens who were *lawfully* present in the country. Thus, aliens who had entered the country unlawfully, or whose permission to remain had been withdrawn, became subject to national power free of constitutional constraint.[1041] To hold otherwise, the government argued, would be to hold that an alien could enter "against the express will of

1036. *See* SALYER, *supra* note 769, at 80–81 (presenting statistics on how frequently collector determinations were reversed from 1891 to 1905).

1037. 163 U.S. 228 (1896).

1038. *Id.* at 239 (Field, J., concurring in part and dissenting in part).

1039. Brief for Appellants at 6–9, *Wong Wing* (No. 204).

1040. *Id.* at 11.

1041. Brief for the United States at 9, *Wong Wing* (No. 204).

the sovereign and in defiance of its laws," and nevertheless "acquire a status which will give him a right to rely on constitutional guaranties intended to be acquired only in a lawful way."[1042] This would violate the "*paramount* and *inalienable* right of the sovereign to withdraw its consent,"[1043] and in essence determine "that the United States have bartered away or alienated a portion of its sovereign power."[1044] Again arguing from social contract principles, the government now contended that the Constitution imposed no limits on U.S. foreign relations. The Constitution, the government argued,

> was not made nor intended for all humanity, . . . but was ordained and *established by the people of the United States for their own benefit and for the benefit of those lawfully within their territory* . . . . In dealing with other nations and their subjects the people of the United States are not trammeled by restrictions established for their own safety within, but have as full and supreme a power as any other nation, and exercise it under the *jus gentium* with no accountability other than that which every independent Government must give, under a judgment quickened by an enlightened civilization, rendered in the forum of nations . . . .[1045]

The government further argued that the sentence to hard labor was part and parcel of the deportation proceeding, and that the Court must defer to Congress's determination that such imprisonment was necessary to deter Chinese immigration and to aid enforcement of the government's lawful policy.[1046] Deportation alone was an insufficient deterrent—indeed, deportation otherwise was "game" and "a pleasant episode in [the aliens'] lives" in whieh they would be fed, lodged, and returned to China "as a guest of the United States."[1047] The government baldly acknowledged that such an unlimited congressional power would allow the summary execution of unwanted aliens: "It may be said" the government wrote, that Congress "may, by virtue of the same principle, . . . sentence to imprisonment for life or event inflict capital punishment." Although this ordinarily might have been a valid criticism, "[t]he right of Congress, in this case, [was] unlimited, and there [was] no paramount power for it to infringe upon."[1048]

The government also contended that requiring a jury trial before imprisonment could be imposed would be enormously expensive[1049] and

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1042. *Id.* at 12.

1043. *Id.* at 5.

1044. *Id.*

1045. *Id.* at 19–20 (emphasis added); *see also id.* at 10–11.

1046. *Id.* at 23.

1047. *Id.*

1048. *Id.* at 20–21.

1049. *Id.* at 22 ("[T]he country would not only be impoverished by the expense of deporting the vast hordes who would come into the country vested with such sanctity, . . . but the courts . . . would be surrendered to foreigners.").

would cripple the power of the United States relative to other nations. "If the United States . . . can not punish without all of the delay and expense incident to the trial by jury and due process of law which an enlightened civilization has evolved for the protection of its own citizens and invited aliens, the Government is onerated with a burden which no other country would for a moment tolerate."[1050]

Given the sweeping and unreviewable power which the Court had upheld for Congress over permanent residents at the border, it would have been easy for the Court to defer to Congress's determination and hold that the sentence to hard labor was part and parcel of the deportation process. In a seven-to-one decision,[1051] however, the Supreme Court invalidated the law. Writing for the Court, Justice Shiras rejected the argument that aliens unlawfully present lacked constitutional protection, and affirmed the broad, limited government and territorial vision of *Yick Wo*. *Yick Wo*, Justice Shiras held, recognized that the Fourteenth Amendment was universal in its application to all persons within the territorial jurisdiction of the United States. The same reasoning applied to the Fifth and Sixth Amendments, with the result that "even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."[1052] Shiras acknowledged that "[n]o limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel [them]."[1053] The case, however, did not present a question of the "inherent and inalienable right of every sovereign and independent nation" to exclude or expel aliens. Instead, the case addressed whether Congress could further the policy of deportation by adding imprisonment at hard labor without a trial by jury.[1054] The Court thus declined to allow the classically punitive sanction of imprisonment at hard labor to be incorporated into the concept of "nonpunitive" deportation.[1055]

Perhaps motivated by the government's assertion that deportable aliens could be subjected to capital punishment without constitutional protection, Justice Field filed an unusual opinion in whieh he attacked the "harsh and illegal assertions, made by counsel of the Government . . . as to the right of the court to deny to the accused the full protection of the law and Constitution against every form of oppression and cruelty to them."[1056]

1050. *Id.* at 23.
1051. Justice Brewer took no part in the decision.
1052. *Wong Wing*, 163 U.S. at 238.
1053. *Id.* at 237.
1054. *Id.* at 233–34.
1055. *Id.* at 237–38.
1056. *Id.* at 239 (Field, J., concurring in part and dissenting in part).

> The term "person," used in the Fifth Amendment, is broad enough to include any and every human being *within the jurisdiction of the republic.* A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.
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> . . . .
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> The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar—in face of the great Constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws.[1057]

The fact that the government could expel or exclude such an alien did not mean that it could confine them at hard labor before deportation or subject them to any other cruel punishment.[1058]

Wong Wing reaffirmed the limited government vision for unlawful aliens and thus strengthened the Court's distinction between recognizing constitutional protections for aliens within U.S. territorial jurisdiction and rejecting the Constitution's application to the government's decision regarding an alien's eligibility to enter or remain. In other words, the Court broadly deferred to Congress's decisions regarding aliens' membership in the American polity, while holding that the Constitution otherwise applied to aliens in the United States.

2. United States v. Wong Kim Ark.—The Court's deference to congressional decisions regarding membership, however, was not absolute. The one significant exception to the Court's deference to congressional membership decisions in this period was the 1898 case of *United States v. Wong Kim Ark.*[1059] The question whether Chinese persons could acquire birthright citizenship had become increasingly important as Congress tightened the restrictions on alien Chinese, since citizenship, if established, removed the individual from the reach of the deportation and exclusion laws. *Wong Kim Ark* thus presented the question whether Chinese persons could be natural born citizens under the Fourteenth Amendment, and paralleled the Indian decision in *Elk v. Wilkins.*[1060] The plaintiff was summarily excluded by the collector of customs in San Francisco following a temporary trip to China.[1061] He contended that he was a citizen and thus entitled to enter as a result of his birth in the United States.

1057. *Id.* at 242–43 (Field, J., concurring in part and dissenting in part).

1058. *Wong Wing*, 163 U.S. at 237–38.

1059. 169 U.S. 649 (1898).

1060. *Id.* at 653. *Cf.* Elk v. Wilkins, 112 U.S. 94, 99 (1884).

1061. *Wong Kim Ark*, 169 U.S. at 649.

The United States opposed Wong Kim Ark's admission on the grounds that birth in the United States did not make the Chinese American citizens. The United States maintained that with the exception of Great Britain and her colonies, the majority international law rule was that of *jus sanguinis*—that persons born in the country to *parents* who were citizens, become citizens.[1062] The government urged that aliens, like Indians, were not born "completely subject to [the] political jurisdiction" of the United States, because they owed allegiance to a foreign power.[1063] Citing *Dred Scott* and the Constitution's preamble, the United States argued from social contract principles that the country was established for its citizens "and *their posterity*," and that no person therefore could be a citizen unless born to a citizen or naturalized.[1064] The government urged the Court to interpret the Fourteenth Amendment so as to respect Congress's exclusive authority to confer citizenship through the naturalization power.[1065]

Although the government contended that Congress retained control of citizenship for all aliens through the naturalization laws, it noted that natural-born citizenship for the Chinese was particularly offensive. Chinese aliens, unlike other immigrants, were not allowed to naturalize and Congress had singled them out among all immigrant groups for exclusion from the United States.[1066] Congress accordingly had legislated to make the Chinese a politically subordinated racial caste—an "internal colony"—within the United States.[1067] Because the plaintiff's claim was supported by Justice Field's controlling decision in the District of California,[1068] the lower court found he was a citizen and ordered him released.

1062. Brief for the United States, at 7–8, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 904) (arguing that citizenship based on nationality is the prevailing international law rule).

1063. *Id.* at 38–39 (citing Elk v. Wilkins, 112 U.S. 94 (1884)). *See also id.* at 22 ("Who are subject to the jurisdiction of the United States? Manifestly not those who are subject to the jurisdiction of any other nation, or who owe allegiance to any foreign prince, potentate, state, or sovereignty.").

1064. *Id.* at 16.

1065. *Id.* at 37–38.

1066. The government contended:

> For the most persuasive reasons we have refused citizenship to Chinese subjects; and yet, as to their offspring, who are just as obnoxious, and to whom the same reasons for exclusion apply with equal force, we are told that we *must* accept them as fellow-citizens, . . . because of the mere accident of birth. There certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage.

Id. at 34. If Chinese could be natural-born citizens and thus eligible for the Presidency, "then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and . . . American citizenship is not worth having." *Id. See also* Reply Brief for the United States at 16, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 904) (noting that U.S. law prohibited Chinese laborers from returning to the United States).

1067. TAKAKI, *supra* note 776, at 99.

1068. *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884).

The Supreme Court's six-to-two decision[1069] in *Wong Kim Ark*, upholding Chinese birthright citizenship, produced lengthy and passionate opinions on both sides of the Court. Writing for the majority, Justice Gray held that while every nation had "the inherent right" to determine "what classes of persons shall be entitled to its citizenship,"[1070] the Fourteenth Amendment had resolved that question by incorporating the English common-law custom that birth "within the allegiance . . . of the king" gave rise to citizenship.[1071] The limiting words "subject to the jurisdiction thereof," excluded Indians born to tribes, as *Elk* had held, but did not exclude Chinese persons born in the United States, who unquestionably were subject to its "full and absolute territorial jurisdiction."[1072] "It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides," Gray wrote.[1073] *Yick Wo* had confirmed that the Fourteenth Amendment applied to aliens,[1074] and the mere fact that Chinese persons were exempted from the right to naturalize, and that Congress had legislated to exclude them, could not alter this constitutional principle.[1075]

Chief Justice Fuller vociferously dissented, together with Justice Harlan, who had argued in favor of Indian birthright citizenship in *Elk*.[1076] Fuller's opinion embraced the government's argument that citizenship was governed by the international, not common-law, rules of descent. The dissenters also disputed that Chinese were subject to the jurisdiction of the United States within the meaning of the amendment. Chinese nationals were not allowed to naturalize and remained bound to the emperor of China by duty and religion.[1077] Fuller and Harlan thus accepted the government's contention that Congress possessed power, notwithstanding the Fourteenth Amendment, to prohibit "all persons of a particular race, or their children," from becoming

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1069. Justice McKenna took no part in the decision because he was not a member of the Court when the case was argued. Chief Justice Fuller and Justice Harlan dissented.

1070. *Wong Kim Ark*, 169 U.S. at 668.

1071. *Id.* at 655.

1072. *Id.* at 684.

1073. *Id.* at 693.

1074. *Id.* at 696.

1075. *Id.* at 699–701.

1076. Justice Harlan's concurrence in Fuller's dissent has perplexed scholars, given his vote in favor of citizenship in *Elk* and his sympathy elsewhere for the Chinese. It is possible that Harlan's distinction between entitlement to birthright citizenship for Indians and that for aliens turned on his belief, suggested in *Elk*, that while aliens were voluntarily present and capable of returning to the protection of their government, Indians owed no allegiance to any foreign power and, absent birthright citizenship, would be left "a despised and rejected class of persons, with no nationality whatever." Elk v. Wilkins, 112 U.S. 94, 122 (1884) (Harlan, J., dissenting). *But see* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156 (1996) (arguing that Justice Harlan "was a faithful opponent of the constitutional rights of Chinese for much of his career on the Court").

1077. *Wong Kim Ark*, 169 U.S. at 725–26 (Fuller, C.J., dissenting).

citizens.[1078] The dissenters noted with irony that the majority ruling would exempt children born on U.S. soil from the plenary power to expel or deport their alien parents that had been recognized so often by the court.[1079]

The upshot of *Wong Kim Ark* was that the bonds of the Chinese to their home country—unlike the tribal bonds of Native Americans born to tribes in *Elk v. Wilkins*—were insufficient to bar the Chinese from citizenship under the Fourteenth Amendment. The Court applied a rule of absolute sovereignty over persons within U.S. jurisdiction to hold that the Chinese, despite half a century of federal and local discrimination, were equally entitled to birthright citizenship. The decision contrasted sharply with the Court's persistent willingness to defer to congressional decisions regarding U.S. membership in both the Indian and territorial contexts.[1080] The Court's decision ultimately may have been motivated by its inability to distinguish meaningfully between the children of the Chinese and those of English, Scottish, Irish, German, or other European immigrants, "who have always been considered and treated as citizens of the United States."[1081] The decision also was likely to have little immediate impact, since few Chinese children were likely to be born in the United States. Women made up only a tiny fraction of the Chinese population in the United States,[1082] and the isolation of the Chinese community made interracial marriage unlikely.

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The classical immigration cases of the last decade of the nineteenth century established that the immigration power, although not enumerated in the Constitution, was inherent in the sovereignty and nationhood of the United States. After resolving half a century of debate by locating the immigration power in the Commerce Clause, the Court between 1889 and 1900 abandoned the effort to locate the power in any particular constitutional provision. Instead, the Court adopted an absolutist view of power over aliens under international law to hold that the authority to determine who could enter or remain was both dedicated to the political branches and unlimited by other constitutional constraints. The foreign affairs and national security implications of immigration were a primary justification for the Court's abdication of ordinary constitutional analysis in this area.[1083] The Court

1078. *Id.* at 732 (Fuller, C.J., dissenting).

1079. *Id.* at 705–06, 726 (Fuller, C.J., dissenting).

1080. *See, e.g.*, Elk v. Wilkins, 112 U.S. 94, 103–07 (1884); The Insular Cases, *supra* note 45.

1081. *Wong Kim Ark*, 169 U.S. at 694.

1082. Of 63,199 Chinese in the United States in 1868, only 4,566 were female. TAKAKI, *supra* note 776, at 121. The 1870 California census indicated that there were 3,536 Chinese women in the state, *id.*, and by 1880, the number had dropped to 3,171. *Id.* at 123. The imposition of the Chinese exclusion laws after 1882 ensured that these numbers would remain low.

1083. *E.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 705–06 (1893).

repeatedly portrayed Congress's control over admission and expulsion of aliens as so exclusive as to completely prohibit review by the courts.[1084]

Despite the rhetoric, however, the doctrine of powers inherent in sovereignty did not necessarily imply that courts were completely barred from considering the issue. The Court in *Fong Yue Ting* reviewed the statutory provisions, albeit deferentially, for constitutionality.[1085] The Court also rejected the more extreme social contract positions urged by the government that the Constitution did not apply to *any* interactions between aliens and the national government,[1086] or that it did not apply to aliens who no longer were lawfully present in the United States.[1087] The Court's recognition of plenary power was limited to issues of entry and expulsion, and the Court recognized in *Yick Wo*, *Wong Wing*, and *Wong Kim Ark* that various constitutional protections applied to Chinese present in the United States. The Court in this sense reached a compromise between the extreme Federalist social contract theory and the Jeffersonian limited government vision.

I. The Constitutionalization of the Immigration Power

The doctrine of inherent plenary power had sweeping implications for immigration jurisprudence. In 1903, the doctrine was applied to uphold the deportation of a non-English-speaking alien in proceedings where the alien was afforded neither counsel nor translation.[1088] Two years later, the Court held that Congress could bar judicial review even of exclusion decisions involving alleged U.S. citizens.[1089] By 1909, the doctrine was sufficiently entrenched for the Court to pronounce infamously that "over no conceivable subject is the legislative power of Congress more complete" than immigration.[1090] In the 1913 case of *Tiaco v. Forbes*,[1091] Justice Holmes stated, "It is admitted that sovereign states have inherent power to deport

1084. *See* Lees v. United States, 150 U.S. 476, 480 (1893) (holding that Congress's absolute "power to exclude [is] . . . not open to challenge in the courts"); *Fong Yue Ting*, 149 U.S. at 706 (stating that Congress's decisions are "conclusive upon the judiciary"); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (stating that the power over entry "belongs to the political department"); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (asserting that the legislative power is "conclusive upon the judiciary").

1085. *Fong Yue Ting*, 149 U.S. at 729–30. *See supra* notes 988–90 and accompanying text.

1086. *See* Brief for the United States at 40, *Fong Yue Ting* (No. 1345) (arguing that aliens "are not entitled to appeal to the Federal Constitution for protection against the Federal Government itself").

1087. *See supra* notes 1041–48 and accompanying text.

1088. Yamataya v. Fisher, 189 U.S. 86 (1903).

1089. United States v. Ju Toy, 198 U.S. 253 (1905).

1090. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909); *see also* United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904) (rejecting a First Amendment challenge to Congress's power to exclude anarchists).

1091. 228 U.S. 549, 557 (1913) (upholding the deportation of a Chinese national by the Philippine government against a due process objection).

aliens, and seemingly that Congress is not deprived of this power by the Constitution of the United States."[1092] By 1915, the doctrine was extended to female U.S. citizens who married aliens. Thus, in *Mackenzie v. Hare*,[1093] the Court upheld a federal statute providing that a female U.S. national who married a foreigner lost her U.S. citizenship, even if she continued to reside in the United States.[1094] The Court relied both on the subordinate legal status of women[1095] and an inherent national security rationale. The marriage of an American woman with a foreigner, here a British national, "involve[d] national complications . . . tantamount to expatriation," which could "bring the Government into embarrassments, and . . . into controversies."[1096] The power to expatriate citizens in this manner accordingly derived from sovereignty:

> As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.[1097]

In 1932, the inherent powers doctrine was again applied to uphold Congress's power to subpoena a U.S. citizen from abroad.[1098] In the McCarthy era case of *United States ex rel. Knauff v. Shaughnessy*, the Court inverted *Mackenzie* to uphold the exclusion, without a hearing, of the alien bride of a U.S. citizen.[1099]

The doctrine of plenary power over immigration was reinvigorated by the cold war immigration cases of the early 1950s, in which the Court combined the doctrine with *Curtiss-Wright* to uphold an inherent *executive*

1092. *Id.* at 556.

1093. 239 U.S. 299 (1915).

1094. *Id.* at 311–12.

1095. The statute's targeting of women only apparently rested in the "ancient principle" of the merger of identity of husband and wife. *Id.* at 311. The decision thus was consistent with the legally subordinate status of female citizens of the era. *See* L.V. BAR, THE THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW § 71(5) (G. R. Gillespie trans., The Edinburgh Press 1892) ("The naturalisation of a foreign woman who marries a citizen is a privileged species of naturalisation, which by almost all legal systems takes full effect *ipso jure* . . . .").

1096. *Mackenzie*, 239 U.S. at 312.

1097. *Id.* at 311.

1098. In *Blackmer v. United States*, the Court held:

> What in England was the prerogative of the sovereign in this respect, pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States. It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned . . . . And the Congress may provide for the performance of this duty and prescribe penalties for disobedience.

284 U.S. 421, 437–38 (1932).

1099. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

power over immigration.[1100] Thus, Justice Minton wrote in *Knauff v. Shaughnessy*:

> The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the *executive power* to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing *an inherent executive power.*[1101]

The McCarthy-era cases upheld the power of the United States to indefinitely detain a returning permanent resident, without a hearing, on undisclosed national security grounds,[1102] and authorized the expulsion of long-term residents for prior, lawful membership in the Communist Party.[1103] In 1954, Justice Frankfurter acknowledged the anomalous nature of the plenary power doctrine in light of developments in substantive due process jurisprudence but declined to reconsider it.[1104]

The Court has held that the First Amendment does not bar the exclusion of aliens on ideological grounds,[1105] and in 1982, the Court confirmed that an alien seeking entry "has no constitutional rights regarding his application."[1106] The plenary power doctrine also has been applied to uphold overt discrimination on the basis of race and national origin in immigration policies.[1107]

Nevertheless, the immigration power has been normalized somewhat. The Court continues to rely on "ancient principles of the international law of nation states" to withhold constitutional protection from aliens at the border.[1108] But as in the Indian context, the Court has reformulated the power as arising to some degree from the Constitution's enumerated

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1100. *See id.*

1101. *Id.* at 542 (citations omitted) (emphasis added).

1102. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214–15 (1953).

1103. *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding the deportation of a legally resident alien because of his membership in the Communist Party); Galvan v. Press, 347 U.S. 522 (1954) (upholding the deportation of a legally resident alien on the same grounds).

1104. *Galvan*, 347 U.S. at 530–31 ("[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . . . But the slate is not clean.").

1105. Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).

1106. Landon v. Plasencia, 459 U.S. 21, 32 (1982).

1107. *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 97 (1903) (stating that Congress may exclude aliens of a particular race from the United States). Until 1952, U.S. "national origins" policy tied the number of immigrants admitted annually to the percentage of existing U.S. inhabitants of that nationality. The Act excluded Indians and descendants of slave immigrants from the enumeration of American inhabitants. *See* Immigration Act of 1924, ch. 190, § 11(b) & (d), 43 Stat. 153, 159. For further discussion of the relationship between the plenary power doctrine and race discrimination, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

1108. *Kleindienst*, 408 U.S. at 765.

provisions. In 1904, the Court questioned whether the immigration power was inherent or derived from the Foreign Commerce Clause.[1109] In *Toll v. Moreno*, the Court held that the power arose from "various sources," including the enumerated naturalization and foreign commerce powers, as well as general "foreign affairs" powers,[1110] while in *INS v. Chadha*, the authority was derived solely from the Naturalization Clause.[1111]

Some substantive constitutional restrictions on the doctrine have also been recognized. As early as 1903, the Supreme Court had held that at least limited due process applied to an alien in *deportation* proceedings, even though the alien allegedly was illegally present in the United States.[1112] The Court has held that returning resident aliens, such as Chae Chan Ping, are entitled to due process in exclusion hearings.[1113] The Court also made limited habeas corpus available to aliens in exclusion and deportation proceedings who claimed to be U.S. citizens.[1114]

Decisions in the 1970s and 1980s suggested that the Court had qualified the plenary power doctrine. In *Fiallo v. Bell*,[1115] for example, the Court held that while the power was "largely immune" from judicial review, some review was available. In *INS v. Chadha*, the Court rejected the government's contention that Congress's plenary power under the Naturalization Clause granted it "unreviewable authority over the regulation of aliens"[1116] and invalidated the single-house veto over deportation decisions. And as in the Indian context, the federal courts have developed subconstitutional review mechanisms to ensure some procedural protections for aliens.[1117] The *Yick Wo* tradition of affording constitutional protections to aliens within the

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1109. United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904) ("Whether rested on the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to [exclude or expel foreigners] . . . ; or on the power to regulate commerce with foreign nations, . . . the act before us is not open to constitutional objection.").

1110. Toll v. Moreno, 458 U.S. 1, 10 (1982). *See also* Mathews v. Diaz, 426 U.S. 67 (1976).

1111. INS v. Chadha, 462 U.S. 919, 940 (1982).

1112. *Yamataya*, 189 U.S. at 101 (holding that due process protections of notice and a hearing are available to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction"); *see also* Wong Yang Sung v. McGrath, 339 U.S. 33, 48–51 (1950).

1113. Landon v. Plasencia, 459 U.S. 21, 32–34 (1982).

1114. Chin Yow v. United States, 208 U.S. 8 (1908) (finding that habeas is available to review the arbitrary denial of an opportunity to establish citizenship in exclusion proceeding); Ng Fung Ho v. White, 259 U.S. 276, 283–85 (1922) (recoguizing a due process right to judicial review of nonfrivolous citizenship claims in deportation proceedings).

1115. 430 U.S. 787, 792 (1977).

1116. *Chadha*, 462 U.S. at 940–41 ("The plenary authority of Congress . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."). *See also* Legomsky, *supra* note 51, at 255, 257 & n.12, 299–304.

1117. *See generally* Motomura, *supra* note 554, at 1656 (stating that in several areas of immigration law, procedural due process claims have come to serve as surrogates for substantive constitutional rights).

United States has continued as the Court has recognized First and Fourth Amendment protections for aliens[1118] and held that state laws discriminating on the basis of alienage are subject to strict scrutiny.[1119] In *Zadvydas v. Davis*, the Supreme Court rejected the government's contention that the plenary power doctrine eliminated any due process concerns regarding the indefinite detention of deportable aliens, noting that "that power is subject to important constitutional limitations."[1120] The Court recently suggested a preference for applying ordinary equal protection analysis to the immigration context, where possible.[1121] On the other hand, as in the Indian and territory contexts, the Court has invoked the plenary power doctrine to give the *federal* government broad authority to discriminate on the basis of alienage in distributing government benefits. In *Mathews v. Diaz*, for example, the Court emphasized the implications of immigration for "our relations with foreign powers" to hold that equal protection challenges to alienage discrimination in federal welfare legislation are subject only to rational basis scrutiny.[1122]

Thus, the power over exclusion and deportation is far from normalized. As Professor Aleinikoff has noted, the anomalous treatment of aliens in deportation and exclusion proceedings yields the bizarre result that an alien can be lawfully deported or excluded for conduct for which, under the First Amendment, she could not be imprisoned.[1123] Despite limited due process protections, visa denials by U.S. consular officials are unreviewable, aliens are not entitled to government-appointed counsel or protected by the exclusionary rule in deportation proceedings,[1124] and homosexuality has been upheld as a lawful bar to naturalization.[1125] Moreover, the United States regularly maintains, and the courts frequently agree, that federal immigration laws should be subject to little or no judicial review, based on the

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1118. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 148 (1945) (First Amendment); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (Fourth Amendment search and seizure).

1119. Graham v. Richardson, 403 U.S. 365, 371, 372 (1971). *See also* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 602 (1976); *In re* Griffiths, 413 U.S. 717, 721–22 (1973); Sugarman v. Dougall, 413 U.S. 634, 642 (1973).

1120. Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

1121. In *Tuan Anh Nguyen v. INS*, the Court found that a statute that conferred automatic citizenship on children born abroad to U.S. citizen mothers, but not to U.S. citizen fathers, satisfied "conventional equal protection scrutiny," and thus did not require consideration of the "wide deference" afforded to Congress in the immigration area. 553 U.S. 53, 72–73 (2001).

1122. Mathews v. Diaz, 426 U.S. 67, 81 (1976). For further discussion of the relationship between the plenary power doctrine and the Court's equal protection analysis, see Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

1123. Aleinikoff, *supra* note 51, at 868.

1124. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

1125. *In re* Longstaff, 716 F.2d 1439 (5th Cir. 1983).

immigration power's roots in "national sovereignty, foreign relations, and the fundamentally political character of nationality decisions."[1126]

V. Authority over the Territories

The third line of nineteenth century decisions critical to the development of the inherent powers doctrine concerns the authority of Congress to acquire and govern territories beyond the borders of the original states. The absence of any authority to govern territories and admit new states had created a crisis under the Articles of Confederation, which had not mentioned territories other than to authorize the admission of Canada and other colonies with the consent of nine of the existing states.[1127] Following the Revolutionary War, various states had ceded large tracts of western lands to the United States, and two months before the Constitutional Convention, the Continental Congress passed the Northwest Ordinance of 1787,[1128] which provided for the governance of these territories and their eventual admission to the Union as states. Madison and others considered this to be an entirely unconstitutional (albeit necessary) exercise of authority.[1129] In addition to the need to create a continuing authority to administer this territory, the drafters of the Constitution anticipated that Georgia and North Carolina also would soon cede their western lands to the United States,[1130] and some may have anticipated the acquisition of Canada or other territories.[1131] Thus, the Framers viewed the power to admit new states and to make rules and regulations for territories as "a power of very great importance" due to "the

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1126. Brief for the United States at 8, 12–14, 22, Miller v. Albright, 523 U.S. 420 (1998) (No. 96-1060). For further discussion, see Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1.

1127. ARTICLES OF CONFEDERATION Art. XI, *reprinted in* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES app. A, at 222 (1913) ("CANADA acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.").

1128. Congress re-enacted the Northwest Ordinance in its first session in 1789. *See* Act of Aug. 7, 1789, 1 Stat. 50 (providing for the government of the territory northwest of the Ohio River). *See also* THE NORTHWEST ORDINANCE, 1787: A BICENTENNIAL HANDBOOK (Robert M. Taylor, Jr. ed., 1987).

1129. *See* THE FEDERALIST No. 38, at 239–40 (James Madison) (Clinton Rossiter ed., 1961) (noting that Congress had administered the U.S. territories "without the least color of constitutional authority" due to "the necessity of the case").

1130. *Id.* at 239 ("We may calculate, therefore, that a rich and fertile country of an area equal to the inhabited extent of the United States will soon become national stock."); *see also* Scott v. Sandford, 60 U.S. (19 How.) 393, 435–36 (1857).

1131. *See, e.g.*, 9 THE WORKS OF JOHN ADAMS 631–32 (Boston, Little, Brown & Co., 1856) ("I . . . think it highly probable that the [constitutional] Convention meant to authorize Congress in [the] future to admit Canada and Nova Seotia into the Union, in case we should have a war, and be obliged to conquer them by kindness or force."). Gouverneur Morris anticipated the acquisition of Canada and Louisiana. *See infra* note 1148.

inconvenience of this omission" under the Articles and the unfortunate "assumption of power into which Congress have been led by it."[1132]

The result of this concern was the Territory Clause of Article IV, which provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States."[1133] Article IV also provides for the admission of new states.[1134] While the Territory Clause might appear adequate to cover powers of territorial acquisition and governance, some nineteenth century commentators ranging from Thomas Jefferson to Chief Justice Taney viewed the clause as limited to "the territory" which the United States possessed when the Constitution was adopted.[1135] Alternative plausible sources of authority for property acquisition include the treaty and war powers, but the Constitution is otherwise silent regarding the United States' authority to acquire and govern new territory.

Among the criticisms directed at the proposed Constitution in 1787 was the alleged ungovernability of "the great extent of country which the Union embrace[d]."[1136] Nevertheless, the United States grew rapidly over the course of the 1800s as a result of western and colonial expansion. In the fifty years between 1803 and 1853, the land area of the United States increased by over three hundred percent.[1137] In 1803, the United States acquired the Louisiana Territory, which added 822,000 square acres to the new nation, nearly doubling its size.[1138] The Red River Basin was acquired in 1818, and in 1819 Florida was purchased from Spain. Texas was annexed by joint resolution in 1845, and the Oregon Territory was acquired in an 1846 settlement with Britain.[1139] The Mexican Cession of 1848 (following the Mexican-American War) and the 1853 Gadsden Purchase from Mexico largely completed the acquisition of the forty-eight contiguous states.[1140]

American expansion extended abroad in the second half of the century. The United States acquired approximately seventy Caribbean islands under

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1132. THE FEDERALIST No. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961).

1133. U.S. CONST. art. IV, § 3, cl. 2.

1134. U.S. CONST. art. IV, § 3, cl. 1 ("New states may be admitted by the congress into this Union. But no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislature of the states concerned, as well as of the congress.").

1135. *See infra* notes 1154–62 and accompanying text (discussing Jefferson's position). In *Scott v. Sandford*, 60 U.S. (19 How.) 393, 432 (1857), Chief Justice Taney concluded that the Territory Clause was limited to the original territories in a sophisticated effort to deny the precedential effect of the Northwest Ordinance for congressional power over slavery. *See infra* notes 1317–18 and accompanying text.

1136. THE FEDERALIST No. 14, at 15 (James Madison) (Clinton Rossiter ed., 1961).

1137. HAROLD M. HYAM & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 128–29 (1982).

1138. *Id.*

1139. *Id.*

1140. *Id.*

the Guano Islands Act of 1856. In 1867, Alaska was purchased from Russia,[1141] and Midway Island was acquired from Hawaii. Hawaii was formally acquired by joint resolution of Congress in 1898, and Guam, Puerto Rico, and the Philippines were ceded to the United States following the 1898 war with Spain.

Each of these acquisitions posed fundamental questions for the young regime: Did the United States have constitutional authority to acquire new territory? If so, from where did Congress's authority to govern new territories derive, and what were the limitations upon it? Did the Constitution and federal law apply immediately, or *proprio vigore*, or did these laws have to be affirmatively bestowed upon the territory, either through congressional legislation or by treaty? Did Congress's power include authority to create non-Article III courts and to prohibit slavery? Did ordinary constitutional constraints apply to the exercise of this power? To what extent were territorial inhabitants entitled to constitutional protections and the benefits of citizenship? Congress's efforts to govern the conduct of U.S. nationals abroad raised analogous problems regarding the extraterritorial reach of the Constitution and of federal authority. In the effort to resolve these issues, a tension emerged between the view that constitutional principles of enumerated powers and individual rights applied to all territory possessed by the United States and the concept of inherent, plenary congressional power.

A. International Law and the Territories

As in the Indian and alien cases, the constitutional questions posed by territorial acquisition were powerfully informed by international law principles of the day. As discussed previously in the context of Indian law, international law had long recognized the right of states to acquire uninhabited territories through discovery and occupation, while territories subject to the authority of another sovereign typically had to be acquired through conquest or purchase, both of which were generally concluded through treaties of cession. International practice also recognized the right of the acquiring power to govern a territory as it saw fit. The sovereign had discretion to govern territorial inhabitants either as subordinate colonies and subjects or to give them full citizenship status, and to maintain the laws of the previous sovereign until altered by the new power.[1142] Oppenheim took the extreme view of the authority resulting from conquest:

1141. Treaty Concerning the Cession of the Russian Possessions in North America, June 20, 1867, U.S.-Russia, 15 Stat. 539.

1142. Andrew Lowndes, *The Law of Annexed Territory*, 11 POL. SCI. Q. 672, 679–81 (1896), *available at* http://www.jstor.org; *see also* Calvin's Case, 77 Eng. Rep. 377, 398 (1608) ("[F]or if a King come to a Christian kingdom by conquest . . . he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain . . . ."); WILLIAM HALL, A TREATISE ON INTERNATIONAL LAW 593 (4th ed. 1895) (noting

> Being now their sovereign, [the subjugating State] may indeed impose any burdens it pleases on its new subjects—it may even confiscate their private property, since a sovereign State can do what it likes with its subjects . . . . [D]octrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation become *ipso facto* by the subjugation subjects of the subjugator.[1143]

Enlightenment influences led some international law commentators to hold that at least Christian inhabitants of acquired lands were entitled to have their religious rights protected,[1144] but the practice of states in this respect was not uniform. For uninhabited territories settled by English subjects, "all the English laws then in being, which were the birthright of every subject, [were] immediately there in force."[1145] English law also recognized that neither the Crown nor Parliament could make laws contrary to the fundamental principles of English law.[1146] On the other hand, Blackstone viewed the "infidel" inhabited American colonies as subject to authoritarian rule:

> And therefore the common law of England as such has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject . . . to the control of the Parliament, though . . . not bound by any acts of Parliament unless particularly named.[1147]

Whatever the rule under international law, however, the United States' recent experience as colonial subjects made international law principles of colonial governance particularly abhorrent to American political ideology. There was no suggestion at the Constitution's drafting that the powers recognized by international law to acquire and govern subjugated colonies

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that such inhabitants "become subjects of the State and are naturalized for external purposes, without necessarily acquiring the full status of subjects or citizens for internal purposes").

1143. FRANCIS & OPPENHEIM, *supra* note 136, § 240.

1144. *See* SHARON KORMAN, THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 34 (1996). Following the conquest of French Canada in the Seven Years' War, for example, Parliament adopted the Quebec Act of 1774, "which recognized the wishes of the French Canadians to retain their religion, rights, and customs." *Id.* at 35. It is unclear whether this legislation was considered to reflect an international law obligation, however, since Great Britain simultaneously was enforcing Protestantism on Irish Catholics. *Id.*

1145. FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 905 (2d ed. 1848) *see also* Rex v. Sawyer, 175 Eng. Rep. 41, 48 (1815); The Zollverein, 166 Eng. Rep. 1038, 1040 (Adm. 1856) (both holding that English statutes bind English subjects everywhere).

1146. *See, e.g.*, Campbell v. Hall, 20 State Trials 239, 319 (K.B. 1774).

1147. BLACKSTONE, *supra* note 135, at *108–09; *accord* Dawes v. Painter, 89 Eng. Rep. 126, 175 (1674) (maintaining that "for all islands and other places *extra maria*, though they are part of the King's dominions, yet they are not governed by the laws of England, unless it were so appointed by Act of Parliament").

numbered among the enumerated powers of the national government.[1148] While the 1787 Northwest Ordinance recognized that territories had no immediate right to representative government,[1149] the Ordinance established a precedent that territorial inhabitants would be given the privileges and immunities of citizenship, other constitutional protections, and eventual statehood.[1150] On the other hand, U.S. relations with Indians from the beginning incorporated international principles of colonial conquest. In dicta in *Johnson v. M'Intosh*, Chief Justice Marshall would embrace international law principles regarding relations between the conqueror and conquered.[1151] In little over a decade after the Constitution's adoption, fundamental challenges to the meaning of the Territory Clause and to the powers of the national government to acquire and govern territory began to emerge.

B. The Louisiana Purchase

Conflicts with Spain over navigational rights to the Mississippi and the twin desires to provide lands for western settlement and relocate Indians from the East prompted Jefferson to negotiate the purchase of the Louisiana Territory from Napoleon in 1803 for the sum of fifteen million dollars.[1152]

1148. Gouverneur Morris did later express such an opinion, but noted that his view was not necessarily shared by the other drafters. *See* Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *in* 3 JARED SPARKS, THE LIFE OF GOUVERNEUR MORRIS 192 (Boston, Gray & Bowen 1832). Morris responded to the question whether Congress could admit, as a new state, territory that did not belong to the United States when the Constitution was made, as follows: "In my opinion they cannot. I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made." *Id.*

1149. The Northwest Ordinance established a three-stage process for territorial governance: (1) a brief period of governance by a federally-appointed governor and/or council; (2) establishment of a representative legislature (subject to congressional override), local courts (with appeal to the federal court system), and nonvoting representation in Congress; and (3) statehood. *See generally* ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 6–8 (1989). The Northwest Ordinance and its successors provided that territorial laws must be consistent with the Constitution. THE NORTHWEST ORDINANCE, 1787: A BICENTENNIAL HANDBOOK, *supra* note 1128, at 48–49.

1150. LEIBOWITZ, *supra* note 1149, at 6 ("The Northwest Ordinance . . . stated the underlying principle of territorial evolution in U.S. law and tradition: that the goal of all territorial acquisition eventually was to be Statchood.").

1151. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588–90 (1823). The conqueror, according to Marshall, prescribed the conditions under which new subjects would be governed, and "conquered inhabitants can be blended with the conquerors, or . . . governed as a distinct people." *Id.* at 589–90. "Humanity, however, acting on public opinion," had established "that the conquered shall not be wantonly oppressed . . . ." *Id.* at 589.

1152. For a detailed discussion of the constitutional debates surrounding the Louisiana Purchase, see EVERETT BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803–1812 (Clifton ed. 1972) (1920); ALEXANDER DECONDE, THIS AFFAIR OF LOUISIANA (1976); and David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801–1809*, 39 WILLIAM & MARY L. REV. 1441, 1456–76 (1998). An interesting contemporaneous description of

As with the 1798 Alien Act, the debates in Congress regarding the ratification of the treaty and the establishment of a territorial government set forth many of the essential positions regarding the status of newly acquired territories that would continue to be debated until the *Insular Cases* a century later.[1153]

1. The Power to Acquire Territory.—The first question raised by the Louisiana Purchase was whether or not the United States had constitutional authority to acquire new territories. This issue was less contentious than the question of the power to govern, but nevertheless was an object of debate. Jefferson himself doubted the authority of the government either to acquire the territory or to incorporate it into the Union (as provided by the treaty terms), since he believed the Constitution limited the United States to its existing boundaries.[1154] "The Constitution," he wrote to Senator John Breckenridge of Kentucky, "has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union."[1155] Jefferson felt a constitutional amendment was necessary both to acquire the territory and to govern it.[1156] Jefferson's Attorney General, Levi Lincoln, apparently agreed that the authority of the national government under the Territory and Treaty Clauses was limited to the territory then belonging to the United States.[1157] Most of Jefferson's confidants, however, believed that the treaty power included a power to acquire new territory. Jefferson's Treasury Secretary, Albert Gallatin, argued in a letter to the President that the Territory Clause did not expressly limit Congress's authority to the existing U.S. territory,[1158] and that "the existence of the United States as a nation

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the debates is contained in WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803–1807 (Everett Somerville Brown ed., 1923).

1153. *See infra* subpart (G).

1154. Jefferson wrote:

> [W]hen I consider that the limits of the [United States] are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the [United States], I cannot help believing the intention was to permit Congress to admit into the Union new States which should be formed out of the territory for which, & under whose authority alone, they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, &c. into it . . . .

Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 247–48 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1892).

1155. Letter from Thomas Jefferson to John Breckenridge (Aug. 12, 1803), *in* 8 *id.* at 244.

1156. *See* Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), *in* 8 *id.* at 263 ("[T]he general government has no powers but such as the constitution has given it; & it has not given it a power of holding foreign territory, and still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this.").

1157. Letter from Levi Lincoln to Jefferson (Jan. 10, 1803), *quoted in* BROWN, *supra* note 1152, at 19. Lincoln, however, felt that any constitutional difficulty could be avoided by annexing the territory to one of the existing states. *Id.* at 18–19.

1158. Letter from Gallatin to Jefferson (Jan. 13, 1803), *in* SELECTED WRITINGS OF ALBERT GALLATIN 211, 213 (E. James Ferguson ed., 1967).

presuppose[d] the power enjoyed by every nation of extending their territory by treaties."[1159] The Treaty Clause should be presumed to include this "inherent right to acquire territory."[1160] Gallatin thus foreshadowed Marshall's approach to inherent powers in *McCulloch* by reading the Treaty Clause as incorporating the powers of states to acquire territory under international law.

Jefferson apparently remained unconvinced, however, and during the summer and fall of 1803 he persisted in his belief that a constitutional amendment authorizing the acquisition was required. Jefferson viewed the constitutional interpretation that would allow the territory's acquisition and governance as a direct affront to his strict constructionist principles:

> When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe & precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction.[1161]

Jefferson accordingly drafted two eonstitutional amendments which would have made Louisiana part of the United States and granted citizenship to its white inhabitants.[1162]

Expedience, however, soon prevailed over constitutional principle. Jefferson's cabinet opposed his idea of requesting a constitutional amendment.[1163] The short time period allowed for ratification of the treaty,[1164] and Jefferson's concern that events in Europe would cause Napoleon to change his mind, led Jefferson to ask his friends not to publicize his concerns about the constitutional difficulties involved in annexing

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1159. *Id.*

1160. *Id.* at 214. Gallatin noted, however, that he was not "perfectly satisfied" with his answer and that the issue required further examination. *Id.* at 215. Likewise, Senator Wilson Cary Nicholas of Virginia wrote to Jefferson on September 3, 1803, that he found the power under the Territory Clause "as broad as it could well be made," and that he did not "see anything in the constitution that limits the treaty-making power, except the general limitation of the power given to the government." Letter from Wilson Cary Nicholas to Jefferson (Sept. 3, 1803), *quoted in* BROWN, *supra* note 1152, at 26–27.

1161. Letter from Thomas Jefferson to Wilson Cary Nichols, *in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 1154, at 247.

1162. One amendment provided that "the province of Louisiana is incorporated with the U.S. and made part thereof." The second provided that "Louisiana . . . is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing as other citizens in analogous situations." 8 *id.* at 241, 244–45.

1163. *See* DECONDE, *supra* note 1152, at 181 (noting the Cabinet's cool response and attempts to dissuade Jefferson).

1164. The treaty was required to be ratified within six months of the original signing or by October 30, 1803. *See* BROWN, *supra* note 1152, at 22–23. Jefferson had to call Congress into session three weeks early in order to meet the deadline. 13 ANNALS OF CONG. 11 (1803); PLUMER, *supra* note 1152, at 1.

Louisiana.[1165] When Congress convened to consider the treaty on October 17, 1803, Jefferson did not mention the constitutional issue and simply asked Congress to take such measures as "necessary for the immediate occupation and temporary government of the country; for its incorporation into the Union."[1166] After only two days of debate, the Senate voted twenty-four to seven in favor of ratification. Congress ultimately authorized the President to take possession of the territory and continue the existing government[1167] and appropriated funds for the purchase.[1168] In the debates in Congress, very few members took the position that the United States lacked constitutional authority to acquire territory. Ultimately, both opponents and supporters overwhelmingly lodged the power to acquire territory in the treaty power (and commonly recognized that the war power contained a corresponding authority).[1169] Although a small number of New England Federalists opposed the acquisition, their position was difficult to maintain in light of the fact that the Federalists had previously called for the acquisition of New Orleans by force.[1170]

1165. *See* BROWN, *supra* note 1152, at 25 & n.28. Jefferson admonished: "It will be well to say as little as possible on the constitutional difficulty, and that Congress should act on it without talking." DECONDE, *supra* note 1152, at 184. *See also* Letter from Thomas Jefferson to John C. Breckenridge, *supra* note 1155, at 245 ("nothing must be said on that subject which may give a pretext for retracting but that we should do sub-silentio what shall be found necessary"); Letter from Thomas Jefferson to James Madison, *in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 1154, at 269 ("[T]he less we say about constitutional difficulties respecting Louisiana the better, and that what is necessary for surmounting them must be done *sub-silentio* . . . .").

1166. 13 ANNALS OF CONG. 12 (1803).

1167. Act of Oct. 31, 1803, 2 Stat. 245, ch. 1.

1168. Act of Nov. 10, 1803, 2 Stat. 245, ch. 2.

1169. Representative James Elliot of Vermont cited Vattel and others to argue that the treaty power incorporated international power of territorial acquisition. 13 ANNALS OF CONG. 448 (1803) ("The American people, in forming their Constitution, had an eye to that law of nations . . . . With a view to this law the treaty-making power was constituted, and by virtue of this law, the Government . . . in common with other nations, possess[es] the power and right of making acquisitions of territory by conquest, cession or purchase."). *See also id.* at 468 (statement of Rep. Joseph Nicholson of Maryland) (maintaining that the right to acquire territory was "essential to independent sovereignty" and had been given to the national government through the war and treaty powers); *id.* at 473 (statement of Rep. Caesar A. Rodney of Delaware) ("It does appear to me that the right of acquiring territory must be included in the treaty-making power . . . . I should deem this important authority as nugatory, if it did not give the President and Senate the right to accept a cession of territory . . . ."); *id.* at 50 (statement of Sen. John Taylor of Virginia) (arguing that "this right [acquiring territory is] . . . indispensably annexed to the treaty-making power, and the power of making war"); *id.* at 45 (statement of Sen. Timothy Pickering of Massachusetts (Federalist opponent of the treaty)) (maintaining that he "had never doubted the right of the United States to acquire new territory, either by purchase or by conquest, and to govern the territory so acquired as a dependent province"); *id.* at 58 (statement of Sen. Uriah Tracy of Connecticut (Federalist opponent of the treaty)) ("I have no doubt but we can obtain territory either by conquest or compact, and hold it . . . without violating the Constitution . . . .").

1170. *See* DECONDE, *supra* note 1152, at 178–79. *See also* 13 ANNALS OF CONG. 72 (1803) (statement of Sen. William Cocke of Tennessee); *id.* at 468–69 (statement of Rep. Joseph Nicholson of Maryland).

Whatever Jefferson's motivation in failing to seek an amendment, it is clear that he did not seek to justify the purchase's legality by relying on inherent powers. Instead, he viewed the action as extraconstitutional and therefore unlawful. "The Executive," he wrote, "in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution."[1171] John Quincy Adams also condemned the purchase as a vast assumption of *implied* (not inherent) power by a proponent of limited government.[1172]

2. Territorial Governance and Citizenship.—The primary debate surrounding the Louisiana Purchase turned on the proper relationship between the new territory and the existing Union and the legal rights to which its inhabitants were entitled. This debate was largely inspired by Article III of the treaty, which provided, in relevant part, as follows:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.[1173]

The treaty thus appeared to mandate that the territorial inhabitants ultimately would be granted citizenship and placed on the road to statehood and that "in the mean time" certain fundamental protections would be afforded them.

These treaty requirements provoked an extensive debate in Congress regarding whether a treaty itself could work such changes without further action by Congress. New England Federalists, who feared that the addition of new western states would undermine their political power, argued that a treaty could not incorporate a new state into the Union, and that the treaty therefore was unconstitutional.[1174] Defenders of the treaty, on the other hand, urged that the treaty was constitutional because it did not itself require statehood for the new territory.[1175]

The arguments regarding statehood raised, in a backhanded way, the prospect that Louisiana and future territories could be governed as dependent

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1171. Letter of Thomas Jefferson to John Breckenridge, *supra* note 1155, at 244.

1172. BROWN, *supra* note 1152, at 46–47.

1173. Treaty Between the United States of America and the French Republic, Apr. 30, 1803, U.S.-Fr., art. 3, 8 Stat. 201, 202.

1174. Representative Gaylord Griswold of Connecticut argued that the treaty's attempt to confer statehood was unconstitutional and an usurpation of power. 13 ANNALS OF CONG. 432–33 (1803). *See also id.* at 454–56 (statement of Rep. Samuel Thatcher of Massachusetts).

1175. *E.g.*, *id.* at 50–52 (statement of Sen. John Taylor of Virginia). Other supporters maintained that any possible need for an amendment did not invalidate the treaty. *See id.* at 70–71 (statement of Sen. Wilson Carey Nicholas of Virginia).

colonies, outside of the constitutional protections enjoyed by states and their inhabitants. In other words, the question of statehood asked whether the territory would be placed on the same footing as the existing territories, with citizenship and ultimate statehood for the region's French and Spanish inhabitants, or whether it would be governed as a permanent colony, attached "to the empire as a *fief*," as England ruled Jamaica.[1176] Thus, Representative Roger Griswold of Connecticut contended, "A new territory and new subjects may undoubtedly be obtained by conquest and by purchase; but neither the conquest nor the purchase can incorporate them into the Union. They must remain in the condition of colonies, and be governed accordingly."[1177]

The *source* of Congress's authority to govern the territory was relatively undisputed. Aside from Jefferson's concerns and the objections of John Quincy Adams,[1178] most members of Congress attributed the power of governance to Congress's Article IV powers to make rules for the territories and to admit new states.[1179] Jonathan Dayton of New Jersey was relatively isolated in his view that the Constitution did not apply to the territory either as a source of authority or a constraint. For Dayton, the source of authority was inherent. "I ask the gentleman . . . where, & in what part of the Constitution does he find any authority to legislate for [Louisiana]—The

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1176. ALLAN B. MAGRUDER, POLITICAL, COMMERCIAL AND MORAL REFLECTIONS, ON THE LATE CESSION OF LOUISIANA, TO THE UNITED STATES 95 (Lexington, D. Bradford 1803).

1177. 13 ANNALS OF CONG. 463 (1803). *See also id.* at 45 (statement of Sen. Timothy Pickering of Massachusetts) (maintaining that he "had never doubted the right of the United States to acquire . . . and to govern the territory acquired as a dependent province"); *id.* at 58 (statement of Sen. Uriah Tracy of Connecticut) ("I have no doubt but we can obtain territory either by conquest or compact, and hold it, even all Louisiana, and a thousand times more, if you please, without violating the Constitution. We can hold territory; but to admit the inhabitants into the Union, to make citizens of them, and States, by treaty, we cannot constitutionally do; and no subscquent act of legislation, or even ordinary amendment to our Constitution, can legalize such measures."); *id.* at 457–58 (statement of Rep. John Smilie of Pennsylvania) ("[I]f the prevailing opinion shall be that the inhabitants of the ceded tcrritory eannot be admitted under the Constitution as it now stands, thc pcople of the United States can, if they see fit, apply a remedy, by amending the Constitution . . . . And if they do not choose to do this, the inhabitants may remain in a colonial state."). Representative Samuel L. Mitchill of New York noted that the United States routinely acquired territory by treaty from Indian tribes, whose lands were "as much foreign dominion as the soil of France or Spain." *Id.* at 478.

1178. Newly appointed Federalist Senator John Quincy Adams proposed a constitutional amendment providing that Congress could incorporate new territories into the Union, bestow on the inhabitants the "rights, privileges, and immunities" of citizens, and govern the territory "as may best conciliate the protection of the liberties, property and religion of the said inhabitants with the rights of the United States, of their citizens, and of the respective States, under the Constitution." 3 WRITINGS OF JOHN QUINCY ADAMS 20–21 (Worthington Chauncey Ford ed., 1917). Adams's resolution to form a committee to determine what measures were necessary to carry the treaty into effeet was rejected. 13 ANNALS OF CONG. 105–06, 213 (1803).

1179. *See id.* at 474 (statement of Rep. Caesar A. Rodney of Delaware) (urging that the Territory Clause provides a basis for governance "not merely of territory then held, but of territory which might in future be acquired by treaty or purchase"); *see also id.* at 480 (statement of Rep. Samuel L. Mitchill of New York) (arguing that the Territory Clause provides authority for governance).

constitution gives us no authority on the subject—We derive our power & right from the nature of government—That Country is a purchased territory and we may govern it as a conquered one."[1180]

The question whether the Constitution required that the inhabitants be granted citizenship was obscured somewhat by the treaty's requirements. No one contended that the inhabitants became citizens immediately by operation of the treaty,[1181] and few argued aggressively that the inhabitants *must* be placed on a road to citizenship, although given the treaty's apparent stipulation on that point, this was largely assumed.[1182] One of Jefferson's proposed amendments, for example, would have bestowed immediate citizenship on the region's white inhabitants.[1183] Representative Samuel Mitchill of New York maintained that the inhabitants of the territory were not yet prepared to assume the responsibilities of democratic governance and must serve a "probationary" period, "according to the principles of the . . . Constitution," after which Congress would grant them citizenship.[1184] Congress did not prove ready at that time to bestow citizenship on the Louisianans, however, and an attempt to extend the naturalization act to Louisiana in early 1804 failed with little recorded argument.[1185]

The debates over the government to be established for the new territory shed some light on the prevailing views regarding the application of the Constitution and other federal laws to the territory. Some type of

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1180. PLUMER, *supra* note 1152, at 136 (statement of Sen. Jonathan Dayton of New Jersey). Senator Timothy Pickering of Massachusetts also argued that, as a purchased province, Louisiana was not entitled to representation, and the Constitution did not apply there. *Id.* at 233.

1181. *E.g.*, *id.* at 481 (statement of Rep. Samuel L. Mitchill of New York) ("I do not venture to affirm that, by the mere act of cession, the inhabitants of a ceded country become, of course, citizens of the country to which they are annexed. It seems not to be the case, unless specially provided for.").

1182. Playing the expedient Republican role in arguing in support of the treaty, Senator John Taylor of Virginia emphasized that because the treaty simply required the incorporation of Louisiana as a *territory* of the Union, not as a state, the inhabitants would not have become citizens absent the treaty's requirement. *Id.* at 52. *See also id.* at 1186 (statement of Rep. Joseph Clay of Pennsylvania) (arguing in support of naturalizing the inhabitants that "this privilege had been promised [in the treaty] and ought to be granted").

1183. *See supra* note 1162. In his October 17th Message to Congress, Jefferson referred to the inhabitants as "adopted brethren," 13 ANNALS OF CONG. 12 (1803), which Representative James Elliot of Vermont interpreted as indicating that "we shall gain an acquisition, not of subjects, but of citizens." *Id.* at 395.

1184. Mitchill allowed Congress some discretion:

> They are to serve an apprenticeship to liberty; they are thus to be taught the lessons of freedom; and by degrees they are to be raised to the enjoyment and practice of independence. All this is to be done as soon as possible; that is, as soon as the nature of the case will permit; and according to the principles of the Federal Constitution . . . . They shall, as soon as the principles of the Constitution permit, and conformably thereto, be declared citizens of the United States. Congress will judge the time, manner, and expediency of this.

Id. at 480.

1185. *Id.* at 1185–86.

government was urgently required, and immediately following the ratification, Congress authorized the President to take possession and govern the territory until such time as Congress adopted organizing legislation.[1186] In February 1804, Congress adopted a "temporary" government which was in effect for a year and then replaced after much complaint.[1187] The temporary territorial government was comprised of a governor, a legislative council of thirteen members, and judicial officers serving four-year terms—all to be appointed by the President.[1188] The legislative authority extended to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.[1189] The right of jury trial was granted in capital cases and in all superior court cases if either party requested it,[1190] and the governor had absolute authority to convene and disband the legislative council.[1191] Both laws raised difficult questions regarding what kind of government Congress could lawfully establish in the territories, what constraints the Constitution imposed on congressional power, and to what rights the inhabitants were lawfully entitled.

Most participants in the governmental debates appear to have assumed that some affirmative action was required to make U.S. laws operative in the territory, independent of the question of what the inhabitants were entitled to under the treaty or the Constitution. Members of Congress generally accepted the international law principle that the laws of a conquered or ceded territory remained in place until altered by the new sovereign,[1192] and Jefferson apparently shared this view.[1193] Thus, in adopting the temporary government, Congress provided that certain U.S. laws would be extended to

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1186. The statute provided, in relevant part, that:

> until Congress shall have made provision for the temporary government of the said Territories, all the military, civil, and judicial powers, exercised by the officers of the existing government of the same, shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct [for the maintaining and protecting inhabitants of Louisiana in the full enjoyment of their liberty, property, and religion].

Id. at 498. The bracketed language was added to the final version. *Id.*

1187. *See infra* notes 1224–27 and accompanying text.

1188. Act of Mar. 26, 1804, 2 Stat. 283, 283–84; *see also* 13 ANNALS OF CONG. 1293–95 (1804).

1189. 13 ANNALS OF CONG. 1294 (1804).

1190. *Id.*

1191. *Id.*

1192. *E.g.*, *id.* at 518 (1804) (statement of Rep. Caesar A. Rodney of Delaware) ("It is a received principle of the law of nations, that, when territory is ceded, the people who inhabit it have a right to the laws they formerly lived under, embracing the whole civil and criminal code, until they are altered or amended by the country to whom the cession is made.").

1193. Letter to the Secretary of State (May 19, 1808), *in* 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 1154, at 58–59 ("Louis XIV having established the Costumes de Paris as the law of Louisiana, this was not changed by the mere act of transfer; on the contrary, the laws of France continued and continues to be the law of the land, except where specially altered by some subsequent edict of Spain or act of Congress.").

the territory. The fact that international law recognized that ordinary rules regarding property use, contracts, and crime were not immediately applicable, however, did not clearly address what *constitutional* protections applied to the territory, and in particular what constraints the Constitution imposed on congressional power.

Both the presidential and temporary government bills provoked strong opinions regarding whether Congress could constitutionally establish such a government. Opponents of each bill contended that the Constitution limited Congress's power in the territory. Thus, opponents condemned the initial decision to vest discretion to govern the territory in the President as "despotic"[1194] and argued that the bill violated the constitutional separation of powers, the prohibition on suspension of habeas corpus, and principles of republican government.[1195] Representative Andrew Gregg of Pennsylvania sought to underscore the constitutional constraints on the proposed presidential government with an amendment specifying that the government's actions be "not inconsistent with the Constitution of the United States."[1196] The amendment was opposed on the grounds that Congress obviously could not "pass laws that were unconstitutional" and thus the amendment was "superfluous."[1197]

Opponents likewise condemned the subsequent temporary government as "tyrannical"[1198] and "a military despotism,"[1199] and viewed the lack of representative government as an affront to the Constitution and democratic institutions.[1200] Senator Joseph Anderson of Tennessee, for example,

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1194. 13 ANNALS OF CONG. 511 (1804) (statement of Rep. John G. Jackson of Virginia).

1195. Representative Roger Griswold of Connecticut objected that the powers of the existing government inherited from France might be "inconsistent with the Constitution of the United States," in particular habeas corpus and other constraints on government power. *Id.* at 499. He likewise objected that the complete powers vested in the President violated the constitutional separation of powers. *Id.* at 500 ("I do not . . . understand that, according to the Constitution, we have a right to make [the President] legislator, judge, and executive, in any territory belonging to the United States."); *see also id.* at 510 (same). Representative James Elliot of Vermont concurred in the view that "[s]uch a delegation of power [to the President] was unconstitutional." *Id.* at 499; *see also id.* at 508 (same); *id.* at 510 (statement of Rep. John G. Jackson of Virginia) (noting that he "considered the second section of the bill [giving complete power to the President] as repugnant to the Constitution").

1196. *Id.* at 504.

1197. *Id.* (statement of Rep. Samuel W. Dana of Connecticut).

1198. PLUMER, *supra* note 1152, at 111 (statement of Sen. William Cocke of Tennessee).

1199. *Id.* at 134 (statement of Sen. Thomas Worthington of Ohio).

1200. *Id.* at 135 (statement of Sen. John Smith of Ohio) ("The establishment of a Military government is at war . . . with the letter & spirit of your constitution—which knows no other government than that of Republicanism."); *see also id.* at 111 (statement of Sen. Samuel Maclay of Pennsylvania) ("Those people . . . ought to elect a legislature and have jurors."); *id.* (statement of Sen. William Cocke of Tennessee) ("The people of that country are free—let them have liberty & a free government."). Senator Anderson objected to taxation of the Louisiana inhabitants without representation. *Id.* at 108. Senator Breckenridge stated that he did "not feel any constitutional difficulty as to the form of government" but nevertheless opposed the unrepublican government as arbitrary. *Id.* at 138.

contended that "the only power we have to legislate for that country is derived from the Constitution—& we must give them a republican government—we can give them no other."[1201] Responding to xenophobic arguments in opposition, he noted that more than two-thirds of the inhabitants of upper Louisiana were already American citizens.[1202] John Quincy Adams contended the U.S. government had no power to tax and govern peoples without representation and argued from the Declaration of Independence and fundamental American constitutional principles that the consent of the Louisiana inhabitants was required for their governance.[1203] Adams condemned the bill as "destructive of the essential principles of genuine liberty" and containing "principles repugnant to our Constitution."[1204] He objected, *inter alia*, to the government's lack of popular consent from the Louisiana inhabitants, to the lack of any provision for future representation, as provided by other territorial governments, and to the fact that judges would serve a term of years rather than the constitutional tenure of good behavior.[1205]

In the debates over the temporary government, provisions for more representative government were narrowly defeated. The House passed an amendment for representative government[1206] and insisted on it in conference committee, but narrowly receded from the demand on a pragmatic argument that the variety of languages of the inhabitants would not allow them to communicate in a representative body.[1207] Likewise, the House passed a

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1201. *Id.* at 136; 13 ANNALS OF CONG. 238–39 (1804).

1202. *Id.* at 238–39.

1203. BROWN, *supra* note 1152, at 46–47. Adams offered a resolution on this point: "*Resolved*, That by concurring in any act of legislation for imposing taxes upon the inhabitants of Louisiana without their consent, this Senate would assume a power, unwarranted by the constitution and dangerous to the liberties of the people of the United States." 13 ANNALS OF CONG. 227 (1804). Adams argued in support of the resolution that since "the just powers of a government can be derived *only* from the *consent of the governed*, the French Republic could not give us the right to make laws for the people of Louisiana, without their acquiescence in the transfer." THE WRITINGS OF JOHN QUINCY ADAMS, *supra* note 1178, at 28. Adams also looked beyond the Constitution for support from the Declaration of Independence. *Id.* at 29.

1204. PLUMER, *supra* note 1152, at 144 (statement of Sen. John Quincy Adams).

1205. *Id.* at 144.

1206. 13 ANNALS OF CONG. 1191–93 (1804). An amendment for representative government failed in the Senate by an evenly divided 13-to-13 vote. *Id.* at 251–52.

1207. When the Senate objected to the representative government provisions, the House initially refused to recede by a vote of 63 to 37. *Id.* at 1206. The House then voted 53 to 36 to insist. *Id.* at 1207. The House finally receded on representative government on practical grounds. *E.g.*, *id.* at 1229 (statement of Rep. Joseph Nicholson of Maryland) ("Some of those [Louisiana] parishes were entirely composed of Spaniards, some of French, some of Germans, and some of Creoles. If each of them were to send a member, the Legislative body would be composed of persons of different languages. The representatives of no two parishes would perhaps speak the same languages. This, Mr. N [Representative Nicholson] said, was the principal reason which induced the managers to recommend that the House should recede.").

broad trial-by-jury measure but narrowly receded from it,[1208] although the law ultimately adopted did give the inhabitants a right to *request* a jury trial. The House also attempted to put a time limit on the government,[1209] "on account principally of the great powers conferred on the Executive."[1210]

Supporters primarily defended the presidential government as necessary and temporary,[1211] but proponents for both governments also attempted to justify their constitutionality. Many argued, to a greater or lesser extent, that constitutional *constraints* did not apply. Some supporters rooted the power to establish such governments in the Territory Clause[1212] and argued that the Constitution's limits on power that applied to "States" were not operative in the territories. Thus, Senator Robert Wright of Maryland noted that the Republican Guarantee Clause applied only to states and that the "[t]erritorial governments in this Country are not, or is it necessary they should be, republican."[1213] Others appeared to contend more generally that the Constitution, *in toto*, did not apply to the territory.[1214] The relationship between the territories and slavery was also coloring constitutional arguments.[1215] Senator James Hillhouse of Connecticut, a New England Federalist who wished to limit slavery, contended during the debates on

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1208. The House adopted an amendment to expand the jury trial to more criminal cases, *id.* at 1197, but finally receded from it. *See id.* at 1207.

1209. *Id.* at 1198–99.

1210. *Id.* at 1198 (statement of Rep. Willis Alston of North Carolina).

1211. *E.g.*, *id.* at 503 (statement of Rep. Samuel Mitchill of New York) (stating that "if ever the plea of adopting measures *de necessitate* could be made, it was on such occasion as this"); *id.* at 512 (statement of Rep. Caesar A. Rodney of Delaware) (arguing that the powers were necessary and of short duration).

1212. *Id.* at 502 (statement of Rep. Samuel Mitchill of New York) ("Congress is clothed with the power to dispose of such territory and property, and to make all needful rules and regulations respecting it. This is as fair an exercise of Constitutional authority as that by which we assemble and hold our seats in this House.").

1213. PLUMER, *supra* note 1152, at 137. *See also id.* at 108 (statement of Sen. Jonathan Dayton of New Jersey) ("The constitution has provided only for the representation of States, & no man will pretend that Louisiana is a State."). In the debate over the constitutionality of the treaty's grant of preferential port access to Franee and Spain, Representative Joseph Nicholson of Maryland likewise argued that the preference could not violate the prohibition on preferences "given to the ports of one State over another," because the Louisiana Territory was not a "state," but was "in the nature of a colony whose commerce may be regulated without any reference to the Constitution." 13 ANNALS OF CONG. 471 (1803).

1214. PLUMER, *supra* note 1152, at 137 (statement of Sen. Timothy Pickering of Massachusetts) (maintaining that the Constitution did not extend to the territory and that "[w]e must consider & govern them as a colony," though the United States was bound by treaty to secure their rights and privileges). Caesar Rodney contended that the Territory Clause "does not limit or restrain the authority of Congress with respect to Territories, but vests them with full and complete power to exercise a sound discretion generally on the subject. . . . The limitations of power, found in the Constitution, are applicable to the States and not to Territories." 13 ANNALS OF CONG. 513–14 (1803) (statement of Rep. Caesar A. Rodney of Delaware).

1215. For the debates on extension of slavery to Louisiana, see, *e.g.*, PLUMER, *supra* note 1152, at 111–22, 126–30, 131–34.

extending slavery to the territory that the Constitution did not apply since the territory was "not part or parcel of the United States."[1216]

The Constitution's inapplicability was often justified by nativist views regarding the Catholic inhabitants' incapacity for self-governance. Members of Congress portrayed the French and Spanish inhabitants as "next to a state of nature"[1217] and not yet capable of choosing their government or selecting jurors.[1218] William C. C. Claiborne, who was appointed Governor of the territory, also observed that jury trials initially would "only embarrass the administration of justice."[1219] Supporters generally did not, however, take the position that constitutional protections should never apply or that the people should be kept in second-class status indefinitely; the question seemed to be largely a matter of time and training. Jefferson considered the populace as "incapable of self government as children,"[1220] and suggested that the territorial legislature should introduce democratic governance gradually, in accordance with the populace's ability to adapt,[1221] though he

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1216. *Id.* at 114 (statement of Sen. James Hillhouse of Connecticut) ("The Constitution . . . admits of a Republican government and no other. We must apply the Constitution to that people in all cases or in none—We must consider that country as being within the Union or without it—there is no alternative. I think myself they are not part or parcel of the United States.").

1217. BROWN, *supra* note 1152, at 106.

1218. PLUMER, *supra* note 1152, at 110 (statement of Sen. James Jackson of Georgia) ("The inhabitants of Louisiana are not citizens of the United States—they are now in a state of probation—They are too ignorant to elect a legislature—they would consider jurors as a curse to them."); *id.* at 111 (statement of Sen. Samuel Smith of Maryland) ("Those people are absolutely incapable of governing themselves, of electing their rulers or appointing jurors. As soon as they are capable & fit to enjoy liberty & a free government I shall be for giving it to them."); *id.* (statement of Sen. Wilson Carey Nicholas of Virginia) ("We ought not *yet* to give that people *self-government*."); *id.* (statement of Sen. Timothy Pickering of Massachusetts) ("They are too ignorant to elect suitable men."); *id.* at 134 (statement of Sen. James Hillhouse of Connecticut) ("I would not give them a trial by jury, because they are not used to it—but I would give them the liberty of having trial by jury whenever they are able to express their desire of it by their own legis-ture [sic] & to make laws regulating that mode of trial.").

1219. Letter from William C. C. Claiborne to James Madison (Jan. 2, 1804), *in* 2 ROBERTSON, LOUISIANA UNDER THE RULE OF SPAIN, FRANCE, AND THE UNITED STATES 1785–1807, at 232–34 (1911).

1220. Letter from Thomas Jefferson to Dewitt Clinton (Dec. 2, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 1154, at 283.

1221. *See* Letter from Thomas Jefferson to the Secretary of the Treasury, Albert Gallatin (Nov. 9, 1803), *in* 7 *id.* 275 n.1. Jefferson argued that

> the new legislature will *of course* introduce the trial by jury in *criminal* cases, first; the habeas corpus, the freedom of the press, freedom of religion, etc., as soon as can be, and in general draw their laws and organization to the mould [sic] of ours by degrees as they find practicable without exciting too much discontent. In proportion as we find the people there riper for receiving these first principles of freedom, congress may from session to session *confirm* their enjoyment of them.

Id. (emphasis added). After Congress's establishment of the temporary territorial government, Jefferson observed in an 1804 letter to Secretary of State Madison that Congress had provided that the inhabitants of the territory

> shall continue under the protection of the treaty until the principles of our Constitution can be extended to them, when the protection of the treaty is to cease, and that of our

also appears to have assumed that they were ultimately entitled to such protections. Many maintained simply that the Constitution did not apply until the inhabitants received citizenship or statehood. Representative John Smilie of Pennsylvania argued, for example, that "the Constitution of the United States did not extend to this territory any farther than they were bound by the [treaty]. On this principle they had right, viewing it in the light of a colony, to give it such government as the Government of the United States might think proper, without thereby violating the Constitution . . . ."[1222] He contended, however, that he "would be among the first to incorporate the territory in the Union, and to admit the people to all the rights of citizens."[1223]

The temporary government quickly provoked opposition both in the press and from the inhabitants of the Louisiana Territory, largely for its nonrepresentative character.[1224] The Mayor of New Orleans resigned in protest over the new government and residents of Louisiana petitioned Congress demanding a right of self-government and statehood.[1225] On March 2, 1805, Congress approved a new territorial government extending the principles of the 1787 Northwest Ordinance to the Orleans territory, including the privileges and immunities of citizenship and a bill of rights.[1226] This included provisions for a general assembly of twenty-five elected members, and, upon the achievement of a certain population, preparation for statehood.[1227] The imperial colonial model had been rejected, at least momentarily. The question of the constitutionality of statehood for Louisiana, which was so hotly contested when the treaty was first considered, was never expressly revisited, and Congress admitted Louisiana as a state in 1812.

The Louisiana Purchase was later criticized primarily as an assertion of implied powers that contradicted the strict constructionism of President Jefferson.[1228] But the controversies surrounding the purchase and the

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> own principles to take its place. But as this could not be done at once, it has been provided to be as soon as our rules will admit. Accordingly Congress has begun by extending about 20 particular laws by their titles, to Louisiana.

Letter from Thomas Jefferson to James Madison (July 14, 1804), *in* 8 *id.* 313.

1222. *Id.* at 511–12.

1223. *Id.* at 512.

1224. *See generally* BROWN, *supra* note 1152, at 147–69. Part of the impetus behind the demand for self-government was the desire to determine the slavery issue, which Congress had banned. *Id.* at 159.

1225. *See* 14 ANNALS OF CONG. 1597–608 app. (1803–1804); *id.* at 1608–20.

1226. Act of Mar. 2, 1805, ch. 23, 2 Stat. 322, *in* 14 ANNALS OF CONG. 1674–76 app. (1804); *see also* BROWN, *supra* note 1152, at 160–61.

1227. 2 Stat. 322.

1228. In his *Commentaries*, Justice Story viewed the Louisiana Purchase as one of "the most remarkable" exercises of implied powers by the national government. 3 STORY, *supra* note 288, ch. 27, § 1282, at 166. Story found it "incredible" that the power to acquire and goveru Louisiana could have been in the contemplation of the Framers. "If it exists at all," he argued, "it is unforeseen, and the result of a sovereignty, intended to be limited, and yet not sufficiently guarded."

establishment of the territorial government raised other profound questions that remained unresolved and cast lengthy shadows over the ensuing century. As in the Alien Act debates, few members of Congress contended that the United States' power to govern the territory derived from inherent, extraconstitutional *sources*, though many argued that Congress could exercise its delegated powers in the territory, at least temporarily, without constitutional constraint.

Consideration of the questions of federal power to govern the territory and the rights enjoyed by the inhabitants was complicated by the fact that the Constitution's text did not conclusively resolve its application to the territories. The Constitution did not define citizenship until the adoption of the Fourteenth Amendment. It expressly guaranteed the right to a republican form of government and congressional representation only to the organized states, and it apparently granted Congress the power to admit new states as a matter of discretion. Moreover, as the debates over the Alien Act indicate, the question of the constitutional entitlements of aliens *within* the states of the Union was unresolved at the time of the Louisiana Purchase, and the extension of this question to the new territory simply compounded the confusion. Thus, although the Constitution provided no clear source of authority for proponents of colonial governance, advocates of immediate citizenship, self-government, and eventual statehood had to derive their arguments from the spirit of American political institutions and the ideas of equality and representative government that animated the nation's creation, rather than from the Constitution's text.

The Article III treaty stipulation also colored the debates over representative government and citizenship in many ways, making it difficult to isolate what politicians of the day believed the Constitution itself required. Finally, although the Louisiana Purchase ultimately was resolved with the establishment of a quasi-representative government and the expectation of statehood, wholly undemocratic forms of government had been established in the interim, and even the final territorial government apparently departed from the Constitution (for example, through the appointment of judges for four-year terms).

Id. § 1285 at 167. John Quincy Adams was equally distressed by the implications for strict constitutional construction. "After this," he wrote, "to nibble at a bank, a road, a canal, the mere mint and cummin of the law, was but glorious inconsistency." 5 MEMOIRS OF JOHN QUINCY ADAMS 401 (Charles F. Adams ed., 1875). Judge Cooley was less generous in his portrayal of the acquisition and excoriated the Louisiana Purchase as the original sin of the United States' territorial acquisitions. Thomas M. Cooley, *The Acquisition of Louisiana*, *in* 2 IND. HIST. SOC'Y, PUBLICATIONS 88–89 (1887) ("The poison was in the doctrine which took from the Constitution all sacredness. . . . After this time the proposal to exercise unwarranted powers on a plea of necessity might be safely advanced without exciting the detestation it deserved; and the sentiment of loyalty to the Constitution was so far weakened that it easily gave way under the pressure of political expediency.").

The Louisiana Purchase thus in many ways simply highlighted the ambiguities in the Constitution regarding the United States' ability to engage in colonial rule without resolving them. In the end, the specific question whether inhabitants of newly acquired territories must become citizens destined for statehood was indefinitely deferred by the fact that all the territories acquired between the Louisiana Purchase and 1898 were granted the privileges and immunities of citizenship and constitutional protections by treaty and statute.[1229] As with the Alien Act, no court ever adjudicated the legality of the ultimate compromise reached regarding Louisiana, and the questions of constitutional authority over territories and their inhabitants would await resolution at a later date.

C. *The Constitution and Western Expansion*

The years between the Louisiana Purchase and the Civil War laid important groundwork for the development of the doctrine of inherent plenary congressional power over the territories. A series of early cases presented the Supreme Court with questions that the Louisiana Purchase had left unresolved. Like the Louisiana Purchase, the early cases revealed a tension between a vision of the Constitution as the source of all national government authority, and thus extending to all territories subject to U.S.

1229. Florida was acquired in 1819 under treaty terms analogous to the Louisiana treaty, 8 Stat. 252, and the principles of the Northwest Ordinance, including a bill of rights and the privileges and immunities of citizenship, were extended to it by statute in 1822. 3 Stat. 654. The Treaty of Peace with Mexico which ceded California to the United States included a stipulation for rights of citizenship, and California was quickly admitted as a state. Treaty of Guadalupe Hidalgo, *supra* note 516. The treaty with Russia ceding Alaska followed this model but expressly excluded native tribes from citizenship. *See* 15 Stat. 542, art. 3 ("The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States . . . ."); *see also* Downes v. Bidwell, 182 U.S. 244, 333–36 (1901) (White, J., concurring).

Furthermore, the organizing statutes for the western territories all provided that no territorial laws could be adopted that were inconsistent with the Constitution. For example, the organic statute establishing the territorial government of Utah provided, "That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable." Act of Sept. 9, 1850, ch. 51, § 17, 9 Stat. 453, 458. Section 6 of the Act further provided that the power of the territorial legislature "shall extend to all the rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act . . . ." *Id.* at 454. Section 1891 of the Revised Statutes of the United States provided, "The Constitution and all the laws of the United States, not locally inapplicable, shall . . . have the same force and effect within the organized territories, and in every territory hereafter organized, as elsewhere in the United States." *See* Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1850) (holding that the Constitution applied to the Iowa territory through the Ordinance of 1787 and the organic law establishing the territorial government); Wilkerson v. Utah, 99 U.S. 130 (1878) (holding that the Utah Territory was vested with legislative power over "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States" (quoting Rev. Stat. § 1851 (1856))); Kennon v. Gilmer, 131 U.S. 22, 28 (1889) (holding that the Constitution applied to Montana through the Act of May 26, 1864, ch. 95, § 13, 13 Stat. 91 and Rev. Stat. § 1891); Black v. Jackson, 177 U.S. 349, 363 (1900) (holding that the Oklahoma territory was obligated to pass laws not inconsistent with the Constitution (citing Act of May 2, 1890, ch. 182, § 6, 26 Stat. 81, 84)).

sovereignty, and a vision of a Constitution of limited applicability in the territories, which left congressional authority correspondingly unchecked. The cases also reveal the Court's gradual movement toward a broad, pro-expansionist understanding of national power.

In the 1810 case of *Sere v. Pitot*,[1230] for example, Chief Justice Marshall held that Congress could bestow broader jurisdiction on territorial courts than that authorized by Article III. The "absolute and undisputed power" to govern the Orleans territory, he wrote, either was inherent in "the inevitable consequence of the right to acquire and to hold territory," or arose from the Territory Clause.[1231]

The proposition that the Constitution applied equally to all parts of the "American empire" was asserted in the 1820 case of *Loughborough v. Blake*,[1232] which involved a challenge to Congress's constitutional authority to tax the District of Columbia. Writing for the Court, Chief Justice Marshall found that the taxation power was a general power, not textually limited to any specific territory, which "extends to all places over which the government extends."[1233] Marshall further found that the requirement that "all duties . . . be uniform throughout the United States" applied equally to the District of Columbia.[1234] The "United States," Marshall made clear, included the territories as well as the states:

> Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, *or the territory west of the Missouri*, is not less within the United States, than Maryland or Pennsylvania . . . .[1235]

Loughborough thus reflected a classic enumerated powers approach that viewed the Constitution, at least as a *source* of governmental authority, as extending to all territory subject to U.S. sovereignty.[1236] In light of *Sere*, however, *Loughborough* did not preclude the possibility that some specific constitutional provisions might be inapplicable.

1230. 10 U.S. (6 Cranch) 332 (1810).

1231. *Id.* at 336–37.

1232. 18 U.S. (5 Wheat.) 317 (1820).

1233. *Id.* at 318–19.

1234. *Id.* at 319.

1235. *Id.* (emphasis added).

1236. Later cases involving the District of Columbia similarly confirmed that the District, except for purposes of voting representation in Congress, was a part of the United States and fully protected by the Constitution. *See, e.g.*, Capital Traction Co. v. Hof, 174 U.S. 1 (1899) (holding that the right to trial by jury applies to the District of Columbia); Callan v. Wilson, 127 U.S. 540 (1888) (Harlan, J.) (holding that the constitutional due process, including right to trial by jury in criminal cases, applies to the District of Columbia).

1. American Insurance Co. v. Canter.—Following the acquisition of Florida from Spain in 1819, Congress established a territorial government for Florida which, like other territorial governments, included territorial courts with judges appointed for four-year terms. The ability of the inferior territorial courts to exercise federal admiralty jurisdiction became an object of contention in *American Insurance Co. v. Canter.*[1237] The plaintiffs contended, "The Constitution was made for the whole people of the United States, without reference to their being within the original thirteen states,"[1238] and that Article III's bestowal of exclusive admiralty jurisdiction to the federal courts accordingly was controlling in the territories.

Defendant's counsel, Daniel Webster and John Whipple, in turn argued from international practice that Florida existed outside the Constitution and was subject to plenary congressional authority until Congress deemed otherwise. As Whipple put it,

> How the Constitution became of force in Florida has not been shown. Was it by the Act of cession? Is there any principle in the law of nations, which upon the Act of cession or conquest, gives to the ceded or conquered country, a right to participate in the privileges of the Constitution of the parent country? The usages of nations from the period of Grecian colonization to the present moment, are precisely the reverse.[1239]

Daniel Webster similarly argued that the Constitution only applied to Florida through positive legislation.[1240] Analogizing from English law, Webster maintained that until Congress applied the Constitution to new territories, Congress could govern Florida "as she thought proper."[1241] Webster saw no limitations on Congress's power in the territories and argued that Congress "might have done anything—she might have refused the trial by jury, and refused a legislature."[1242]

Sitting as Circuit Judge, Justice Johnson embraced the defendant's arguments, ruling that the Constitution did not apply to Florida and that only the law of nations limited Congress's power to govern it.[1243] Like some international law scholars, Johnson distinguished between territories that had been acquired from the Indians, which as "vacant" lands immediately became subject to U.S. laws, and territories that had been acquired from

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1237. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828). In 1826, Congress disapproved the provision authorizing inferior territorial courts to exercise admiralty jurisdiction. *Id.* at 533.

1238. *Id.* at 523.

1239. *Id.* at 533 (emphasis omitted).

1240. *Id.* at 538 ("What is Florida? It is no part of the United States. How can it be? —how is it represented? do the laws of the United States reach Florida? Not unless by particular provisions.").

1241. *Id.*

1242. *Id.*

1243. *Id.* at 515 (unnumbered footnote).

another sovereign government, such as Florida. In the latter case, the law of nations established that the "laws, rights and institutions of the territory so acquired remain in full force, until rightfully altered by the new government."[1244] Thus, "the government and laws of the United States do not extend . . . by the mere Act of cession."[1245] Johnson reasoned that the Constitution was adopted only to govern the then-existing states and territories.[1246] Because new territories existed entirely outside of the constitutional structure, the Constitution's dedication of admiralty jurisdiction to the federal courts "[could] have no application" in Florida.[1247]

The Supreme Court upheld the territorial court's jurisdiction without embracing Johnson's extraconstitutional reasoning. Writing for the Court, Chief Justice Marshall contended that the United States' authority to acquire territory derived from the war power and the treaty power.[1248] With regard to the Constitution's application to the new territory, Marshall noted that under the law of nations, laws regarding political allegiance transferred immediately upon the transfer of sovereignty, while other laws continued in force until altered by the new sovereign.[1249] Marshall found it unnecessary to reach the question whether this rule of international law governed the Constitution's application to Florida, since both the treaty with Spain and the federal statute creating the territorial government stipulated that the Constitution applied.[1250]

Having established that the Constitution applied to Florida, Marshall asserted that the power to govern the territories arose from the Territory

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1244. *Id.* at 517–18 (unnumbered footnote).

1245. *Id.* at 517 (unnumbered footnote).

1246. *Id.*

1247. *Id.* at 518 (unnumbered footnote).

1248. *Id.* at 542.

1249. Marshall complained:

> The usage of the world is . . . to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose . . . . The same Act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state.

Id.

1250. *Id.* Article 6 of the February 2, 1819 treaty provided, "The inhabitants of the territories . . . shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities, of the citizens of the United States." Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, Feb. 22, 1819, U.S.-Spain, 8 Stat. 252, 256. The Act of Congress of March 3, 1823, provided that "no law shall be valid, which is inconsistent with the laws and Constitution of the United States." Act of Mar. 3, 1823, ch. 28, 3 Stat. 750 (establishing a territorial government in Florida).

Clause[1251] but immediately qualified this ruling with the suggestion of inherent power:

> Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. *The right to govern, may be the inevitable consequence of the right to acquire territory.* Whichever may be the source whence the power is derived, the possession of it is unquestioned.[1252]

Marshall concluded that the territorial courts, in which judges did not hold life tenure, were not established under Article III of the Constitution.[1253] Instead they were legislative courts, created by Congress either "*in virtue of the general right of sovereignty which exists in the government*," or as a result of the Territory Clause.[1254] Marshall thus found that the requirement that only Article III courts could hear admiralty cases did not apply to the territories, where "Congress exercises the combined powers of the general, and of a state government."[1255] Thus, the Court upheld the non-Article III courts as a proper exercise of "those general powers which [Congress] possesses over the territories."[1256]

Sere and *Canter* contributed significantly to the development of congressional power over territories in at least two respects. First, both decisions suggested that congressional authority might derive from the government's "general right of sovereignty" rather than from any specific constitutional provision.[1257] Second, and in contrast to *Loughborough*, the decisions evidenced a willingness on the part of the Court to find that even certain general constitutional provisions (which contained no textual territorial limitation) did not constrain Congress's power in the territories, where Congress exercised the equivalent of both state and federal legislative power.

The decision in *Canter* left open the question whether the Constitution applied automatically to territorial governments, or whether its operation was dependent upon the positive mandates in the treaty of cession and from

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1251. *Canter*, 26 U.S. at 542 ("Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution, which empowers Congress 'to make all needful rules and regulations, respecting the territory, or other property belonging to the United States.'").

1252. *Id.* at 542–43 (emphasis added).

1253. *Id.* at 546.

1254. *Id.* (emphasis added).

1255. *Id.*

1256. *Id.*

1257. *Cf.* United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537–38 (1840) (holding, with respect to the original U.S. territories, that the power to "make all needful rules and regulations" for the territory was "vested in Congress without limitation").

Congress. Both Marshall and Johnson had recognized that under international law, a nation's laws did not automatically apply to a conquered territory. This analysis, however, begged the question whether U.S. *domestic law* required that U.S. constitutional principles be extended to territories subject to U.S. authority. In his discussion of *Canter* in his international law treatise, Halleck later recognized this weakness in Marshall's analysis:

> This [rule regarding the transfer of sovereignty] is now a well settled rule of the law of nations, and is universally admitted. Its provisions are clear and simple, and easily understood; but . . . [where] the government . . . is a constitutional government, of limited and divided powers, questions necessarily arise respecting the authority, which, in the absence of legislative action, can be exercised in the conquered territory after the cessation of war, and the conclusion of a treaty of peace. *The determination of these questions depends upon the institutions and laws of the new sovereign*, which . . . affect the construction and application of that [international law] rule to particular cases.[1258]

Thus, according to Halleck, although international law allowed the conquering sovereign broad discretion to govern the newly acquired territory, this power was also limited by the scope of the sovereign's authority under its constitution and domestic laws.[1259]

Language in the 1850 case of *Benner v. Porter*,[1260] which again addressed the Florida territorial courts, further suggested ambiguously that the territories were extraconstitutional entities. The territorial governments, the Court reasoned, "are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law," since "they were invested with powers and jurisdiction which [Congress] were incapable of conferring upon a court within the limits of a State."[1261] They were instead "the creations, exclusively, of the legislative department, and subject to its supervision and control."[1262] This plenary power over the territories, however, terminated upon Florida's admission to the Union.[1263] The Court declined to address the applicability of other constitutional constraints to the territories, ruling that "[w]hether, or not, there are provisions in that instrument which extend to and act upon these Territorial governments, it is not now material to examine."[1264]

1258. HALLECK, *supra* note 56, ch. 33, § 14 (emphasis added).

1259. *Accord* Pollard v. Hagan, 44 U.S. (3 How.) 212, 225 (1845) (holding that a conquering power holds new territory "subject to the constitution and laws of its own government, and not according to those of the government ceding it").

1260. 50 U.S. (9 How.) 235 (1850).

1261. *Id.* at 242, 244.

1262. *Id.* at 242.

1263. *Id.* at 243.

1264. *Id.*

2. Fleming v. Page.—The 1850 case of *Fleming v. Page*[1265] again raised the question of whether U.S. laws applied immediately to newly acquired territory or whether some affirmative congressional action was required. The case involved whether a foreign territory under U.S. military control was part of the United States, so that goods imported from the territory to the U.S. were not "imports" subject to U.S. tariff duties.[1266] Congress had declared war with Mexico in 1846, and it was undisputed that the port of Tampico, Mexico, from which the goods were shipped, was "in the exclusive and firm possession of the United States."[1267] Arguing for the plaintiffs, Daniel Webster urged that the determinative issue was whether the territory was subject to U.S. sovereignty. "If it did not belong to us," he asked, "whose was it?"[1268] Citing Grotius, Vattel, Pufendorf, and other international law scholars, Webster contended that under the law of nations, military occupation transferred full sovereignty to the conquering power.[1269] Although perfect title did not transfer until the treaty of peace, "[t]he jurisdiction of the conqueror is complete. He may change the form of government and the laws at his pleasure, and may exercise every attribute of sovereignty."[1270] The Constitution did not pose an obstacle to this principle, since the territories were different from other parts of the United States.[1271] Thus, since sovereignty transferred with occupation, the goods were not "foreign" and could be imported duty-free.

In defense of the import duties, counsel for the United States argued from membership and consent principles that although U.S. sovereignty had attached, the Constitution provided that United States law could not apply until Congress affirmatively acted.[1272] If the plaintiffs' argument were correct, the United States maintained, "every port in Mexico became a domestic port of the United States" during the U.S. occupation, and all the inhabitants "must have become converted into American citizens, without the affirmative consent of the American people."[1273]

Writing for the Court over one dissent,[1274] Chief Justice Taney accepted the government's distinction between U.S. sovereignty and the application of U.S. laws. Taney concluded that though "subject to the sovereignty and

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1265. 50 U.S. (9 How.) 603 (1850).

1266. *Id.* at 606.

1267. *Id.* at 614. U.S. customs duties were being imposed on goods brought into Tampico, and the military commander had received orders to establish temporary civil governments. *Id.* at 609–10.

1268. *Id.* at 614 (reply argument for plaintiffs).

1269. *Id.* at 608 (argument for plaintiffs).

1270. *Id.* at 607 (argument for plaintiffs).

1271. *Id.* at 612 (argument for plaintiffs).

1272. *Id.* at 611 (argument for the United States).

1273. *Id.* at 610, 612 (argument for the United States).

1274. Justice McLean dissented without opinion.

dominion of the United States,"[1275] Tampico was occupied enemy territory and "was not a part of this Union" because it had not yet been formally ceded by treaty or statute.[1276] Like Halleck, Taney argued that the relation between Tampico and the United States "did not depend upon the law of nations, but upon our own Constitution and acts of Congress."[1277] "[I]n this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution."[1278] In particular, Taney rejected the relevance of English law precedents, noting that "[o]ur own Constitution and form of government must be our only guide."[1279] Taney concluded that under the Constitution, only Congress had authority to extend the borders of the United States to a new territory or to subject such a territory to U.S. laws. Mere military occupation could not accomplish this because the president could not constitutionally enlarge the boundaries of the United States.

Taney could have closed at this point, leaving open the question whether U.S. laws applied immediately upon a territory's formal cession to the United States. However, he proceeded to suggest, in dicta, that even after formal cession, only the affirmative imposition of tariff laws by Congress could make a territory part of the "United States" for this purpose.[1280] Thus, territory could belong fully to the United States without being subject to its laws until Congress formally extended those laws to it. The dicta would prove extremely important to the *Insular* decisions.

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As the preceding cases indicate, by the mid-1800s, Supreme Court jurisprudence regarding the Constitution's application in the territories remained in a state of flux. Several fundamental issues remained unanswered. First, the Court remained equivocal about the source of Congress's authority to govern later acquired territories. Chief Justice Marshall had suggested in *Canter* that congressional authority derived either from the Territory Clause or from the government's "general right of sovereignty,"[1281] while *Benner v. Porter* had suggested that the territories were strictly legislative creations organized outside the Constitution.[1282]

Second, the Court had failed to resolve whether the Constitution became immediately applicable to a territory upon its acquisition, or whether an

1275. *Fleming v. Page*, 50 U.S. at 614.
1276. *Id.* at 615.
1277. *Id.*
1278. *Id.* at 618.
1279. *Id.*
1280. *Id.* at 617.
1281. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).
1282. 50 U.S. (9 How.) 235 (1850).

affirmative action by Congress or the existing states of the Union was necessary in order for a territory subject to U.S. sovereignty to be "admitted" to the constitutional community. *Canter* suggested that, under international law, the acquiring nation's laws did not become applicable until positively imposed by the new government, but the Court did not address the constitutional question. *Fleming* held that the dictates of the Constitution, not international law, were controlling, but suggested in dieta that the Constitution required the positive application of U.S. law to a new territory. On the other hand, *Loughborough* had asserted that the Constitution's general clauses applied to all American territory, while *Sere* and *Canter* held that Article III of the Constitution (a general clause) did not constrain congressional authority there.

Finally, the question whether the Constitution required that territorial inhabitants be granted citizenship and placed on the road to statehood continued to be avoided by the fact that these rights were consistently bestowed by treaty and statute.[1283]

Both the propositions that Congress exercised extraconstitutional authority over territories and that the Constitution and citizenship did not immediately apply to new territories left the door open for the application of inherent, extraconstitutional power. Yet the doctrinal support for the propositions was weak. *Canter* had construed congressional power as arising from the Constitution, even if not from any specific clause. The critical language in *Benning* was ambiguous, and that in *Fleming* was pure dicta. Even in its more forceful pronouncements of congressional authority, the Court appeared simply to assert that Congress, in acting over the territories, exercised both state and federal governmental powers, and thus, as a full sovereign, could legislate for the territories in ways not allowed by the Constitution when Congress acted solely for the national government.

D. Slavery and the Territories

The debate over slavery lent urgency to the question whether the Constitution applied to the territories. Some pro-slavery forces argued that the Constitution—including the protection of property rights in slaves—extended to all U.S. territories, and that Congress lacked power under the Constitution to abolish slavery.[1284] Slavery advocates such as John C. Calhoun[1285] and Senator Pierce Butler[1286] vowed "to carry slavery into [the

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1283. *See supra* note 1229.

1284. *See* ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 160–61 (1991) (noting that "it was universally held that, aside from the slave trade, the federal government had no authority to regulate the practice of slavery in any respect").

1285. Downes v. Bidwell, 182 U.S. 244, 275–76 (1901) (citing THOMAS HART BENTON, A HISTORY AND LEGAL EXAMINATION OF THAT PART OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE (1857)). *See also* NEUMAN, *supra* note 54 at 76–77 & n.254.

territories] under the wing of the Constitution."[1287] Calhoun argued that the Constitution provided the exclusive source of congressional authority to legislate for the territories, and thus as a matter of necessity applied there.[1288] Senator Berrien of Georgia took a middle position, arguing that while the constitutive rules of representative government did not apply to the territories, the Constitution's protections of individual rights "of necessity operate in the Territories."[1289]

Abolitionist and free-labor forces, on the other hand, argued that the Constitution applied only to duly admitted states, and that Congress was free to adopt anti-slavery legislation for the territories.[1290] (The Northwest Ordinance's prohibition on slavery supported this proposition but did not resolve it, since the law had been adopted immediately before the Constitution.) During the 1848–49 debates over the extension of slavery to California, New Mexico, and Oregon,[1291] Daniel Webster and Senator Dayton of New Jersey argued that the Constitution did not apply automatically to the territories and that only so much of the Constitution extended to the territories as Congress chose to apply.[1292] As Webster put it, "These principles do not, *proprio vigore*, apply to any one of the territories of

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1286. "This is a principle which can not be disputed, that our fundamental law must necessarily apply to all our possessions . . . . Will it be pretended that in those territories arbitrary punishment can be inflicted without law? . . . I think it exists *proprio vigore*, and I think we can extend it by legislation in the same manner that we can extend the laws of Congress." Brief for the United States at 157–58, Goetze v. United States, 182 U.S. 221 (1901) (No. 340). *See also id.* at 156 ("If by that Constitution slavery is extended, I am willing to stand by that Constitution. I am unwilling to withhold from our Southern brethren any of the rights given to them by that sacred instrument.") (statement of Rep. Benjamin Walker of New York).

1287. *Downes*, 182 U.S. at 276.

1288. Brief for the United States at 161, *Goetze* (No. 340) ("If the Constitution does not extend there, you have no right to legislate or to do any act in reference to the Territorics.").

1289. CONG. GLOBE, 30th Cong., 2d Sess. app. at 279–81 (1849).

1290. Of course, other arguments on both sides were also available. Abolitionists contended that if the Constitution applied to the territories, either Congress had no constitutional authority to establish slavery in the territories, or, in the exercise of its combined federal and local legislative authority, Congress had power to prohibit it. *See, e.g.*, *Downes*, 182 U.S. at 297 n.10 (Whitc, J., concurring) (quoting the 1842 platform of the Free Soil Party). Other proponents of slavery simply wanted to ensure that, whatever the applicability of the Constitution to the territories, the peculiar institution would be protected there.

1291. In 1849, Senator Walker proposed an amendment to give the Constitution "full force and efficacy" in California and New Mexico. CONG. GLOBE, 30th Cong., 2d Sess. 561, 585, 595 (1849); *see also id.* app. at 255. The amendment was opposed by Senator Dayton of New Jersey and other opponents to the extension of slavery to the territories. Brief for the United States at 152–56, *Goetze* (No. 340).

1292. "Let me say that in this general sense there is no such thing as extending the Constitution. The Constitution is extended over the United States and over nothing else. It can not be extended over anything except over the old States and the new States that shall eome in hereafter . . . . Undoubtedly these rights must be conferred by law before they can be enjoyed in a Territory." Brief for the United States at 158–59, *Goetze* (No. 340) (statement of Sen. Daniel Webster); *see also id.* at 154 (statement of Sen. Jonathan Dayton) (asserting that "the Constitution *proprio vigore* does not extend to or reach the Territories at all").

the United States, *because that territory, while a territory, . . . is no part of the United States.*"[1293] Henry Clay similarly suggested either that the Constitution did not apply to the territories or that it did not carry slavery with it:

> [T]he idea that *eo instanti* upon the consummation of the treaty the Constitution of the United States spread itself over the acquired country and carried along with it the institution of slavery is so irreconcilable with any comprehension or any reason which I possess, that I hardly know how to meet it.[1294]

The debate over slavery distorted and complicated the question of the Constitution's geographic scope. The primary question of course, as Chief Justice Marshall had recognized in *Loughborough*, was not whether the Constitution applied in toto to U.S. territories, since some clauses (such as the Republican Guarantee Clause) were expressly limited to the States. The real question, which was obscured by slavery obsessions on both sides, was *which* provisions applied. It also seemed apparent that, regardless of the Constitution's application, Congress had legal power to prohibit slavery in the territories, because the early cases had recognized that in the territories Congress exercised the powers of both the state and national governments. The convergence of the slavery debate with territorial governance was particularly problematic given that between 1845 and 1848 the United States acquired 1,204,000 acres of new territory through the annexation of Texas,[1295] the Oregon settlement, and the 1848 Treaty of Guadalupe Hidalgo with Mexico. Two Supreme Court decisions handed down in the 1850s—*Cross v. Harrison* and *Scott v. Sandford*—supported the proposition that the Constitution applied, fully and immediately, to the later acquired territories.

1. Cross v. Harrison.—The cession of California to the United States following the treaty of peace with Mexico provoked a bitter dispute in Congress over the status of slavery in California.[1296] During the 1848–49

1293. *Id.* at 159. *See also* CONG. GLOBE, 30th Cong., 2d Sess. app. at 274 (1879). On March 23, 1848, however, Webster had argued in the Senate that "[a]rbitrary governments may have territories and distant possessions, beeause arbitrary governments may rule them by different laws and different systems . . . . We can do no such thing. They must be of us, *part* of us, or else strangers." 5 WORKS OF DANIEL WEBSTER 300 (1851).

1294. CONG. GLOBE, 31st Cong., 1st Sess. app. at 117 (1850).

1295. *See generally* FREDERICK MERK, SLAVERY AND THE ANNEXATION OF TEXAS 121–51 (1972). Merk notes that originally, Texas was to be annexed pursuant to a treaty between the United States and the Republie of Texas. When it became apparent that the requisite two-thirds majority of the Senate was unwilling to ratify due to opposition over the admission of a new slave territory, Congress annexed the territory by simple majority through a joint resolution on March 1, 1845. Texas was formally admitted as a state on December 29 of that year. 9 Stat. 108.

1296. Early during the war with Mexico, Congressman David Wilmot of Pennsylvania had offered the Wilmot proviso, which would have imposed the requirement that "neither slavery nor involuntary servitude shall ever exist in any part of [Mexican] territory" acquired by the United States. CONG. GLOBE, 29th Cong., 1st Sess. 1217 (1846). Wilmot and other supporters of the

session, pro-slavery forces in Congress attempted to amend a bill establishing territorial governments for New Mexico, California, and Utah to provide that "the Constitution of the United States . . . be and the same hereby are extended and given full force and efficacy in said territories."[1297] As a result of the ensuing gridlock, between May 1848 and March 1849,[1298] California was governed de facto by the temporary civil government that had been established during the war, without instructions from the national government.

In *Cross v. Harrison*,[1299] importers sued to recover duties that had been collected in San Francisco Harbor during the period after the treaty of peace and before Congress created a customs district in California. Following Chief Justice Taney's dicta in *Fleming v. Page*, the plaintiffs contended that U.S. laws did not apply to the California territory until they were formally imposed by Congress and that the collection of U.S. import duties therefore was *ultra vires*.[1300]

The Supreme Court acknowledged that legal authority for the military government expired upon the signing of the treaty of peace. The Court nevertheless concluded that the anomalous situation in California justified continuing that government.[1301] The Court reasoned that the sovereign powers of the United States had attached to California with the U.S. military occupation[1302] and that U.S. customs laws had applied to California immediately upon its cession. "By the ratifications of the treaty, California became a part of the United States . . . . [It] became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage."[1303] The Court rooted the U.S. authority over California in the Territory and Treaty Clauses and the right to acquire territory.[1304] Thus, contrary to the reasoning in *Fleming*, the decision in *Cross* asserted that the Constitution and laws of the United States applied to new territories immediately upon their acquisition and that the collection of tariffs in California was proper even in the absence of congressional

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proviso in Congress justified it on the grounds that "the negro race already occupy enough of this fair continent; let us keep what remains for ourselves." HYAM & WIECEK, *supra* note 1137, at 129–30.

1297. THOMAS HART BENTON, A HISTORY AND LEGAL EXAMINATION OF THAT PART OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE 14 (photo. reprint 1969) (1857), *quoted in Downes*, 182 U.S. at 275.

1298. The Treaty of Guadalupe Hidalgo was signed on February 3, 1848, and ratifications were exchanged on May 30, 1848. Treaty of Guadalupe Hidalgo, *supra* note 516. Congress adopted customs legislation for California on March 3, 1849. Act of March 3, 1849, ch. 112, 9 Stat. 400.

1299. Cross v. Harrison, 57 U.S. (16 How.) 164 (1853).

1300. *Id.* at 187.

1301. *Id.* at 192–93.

1302. *Id.*

1303. *Id.* at 196.

1304. *Id.* at 194.

legislation. The members of the Court, including Chief Justice Taney, dealt with the apparent tension with *Fleming* by ignoring it.

2. Scott v. Sandford.—The tension between slavery and Congress's authority to legislate for the territories came to a head in *Dred Scott.*[1305] The case challenged the constitutionality of the Missouri Compromise,[1306] which had outlawed slavery in the northern Louisiana Territory. It also raised the threshold jurisdictional question of whether Scott, a free black, was a U.S. citizen who was entitled to sue in U.S. courts. The plaintiff contended that Congress had power to outlaw slavery in the territories under the Territory Clause, and that the Constitution applied fully to all territories destined for statehood.[1307] Interestingly, in an effort to reconcile the ambiguities in *American Insurance v. Canter*, the plaintiff argued that the United States could acquire territory pursuant to the war and treaty powers and to govern the territory despotically, entirely outside of the constitutional structure, according to the law of nations. The Territory Clause only became the source of eongressional authority—and other constitutional protections only applied—once the territory was incorporated into the political union and intended for statehood.[1308] The plaintiff thus largely foreshadowed the argument that would be embraced in the *Insular Cases*.

Chief Justice Taney first denied jurisdiction over Scott's claim. Taney's basic constitutional approach combined strict soeial contract theory and cnumerated powers analysis. Taney viewed the Constitution as a compact between the government and its citizens.[1309] The Constitution and its protections were "formed by them, and for them and their posterity, but for no one else."[1310] Taney believed that while Indians and aliens could be naturalized and thus made bcneficiaries of the political community, blacks had not been citizens of the several states at the time the Constitution was adopted, and could not later be made such, whether by congressional naturalization or by the individual states.[1311] Thus, Scott was not a citizen and could not sue in federal court.

1305. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

1306. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545.

1307. *Argument of Mr. Curtis on Behalf of Plaintiff, reprinted in* 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 241, 246–47, 259–60 (Philip B. Kurland & Gerhard Casper eds., 1978).

1308. *Id.*

1309. *Dred Scott*, 60 U.S. at 404–05 ("They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people' and every citizen is one of this people, and a constituent member of this sovereignty.").

1310. *Id.* at 406.

1311. *Id.* at 407 ("They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, . . . and so far inferior, that they had no rights which the white man was bound to respect . . . .").

Turning to the question of Congress's power to abolish slavery, Chief Justice Taney agreed that the Constitution applied to the territories but held that it barred Congress from outlawing slavery there. Taney rejected the existence of inherent national powers.[1312] In contrast to the government under the Articles, which had enjoyed such powers, the new government "was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from [it]."[1313] "It took nothing by succession from the Confederation."[1314] Taney likewise denied that international law had any relevance to the questions[1315] and adamantly rejected the concept that the national government enjoyed the full panoply of powers held by sovereign nations. Instead, he emphasized the "peculiar" limited sovereignty of the United States:

> [A]lthough it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution.[1316]

Like Jefferson, and contrary to Marshall's suggestion in *American Insurance v. Canter*, Taney denied that the Territory Clause extended beyond the territories that were held by the United States when the Constitution was adopted. It was "a special provision for a known and particular territory, . . . and nothing more."[1317] By so holding, Taney denied the possibility that the Northwest Ordinance's prohibition on slavery had any precedential effect for the territories acquired through western expansion. Nevertheless, Taney

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1312. *Cf. Ex Parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); *see supra* note 275 and accompanying text.

1313. *Dred Scott*, 60 U.S. at 435. *See also id.* at 501–02 (Campbell, J., concurring) (acknowledging that although Britain had enjoyed absolute legislative sovereignty over its possessions, this principle was rejected by the American revolution and the American system) (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823)).

1314. *Id.* at 441.

1315. Taney argued that

> there is no law of nations standing between the people of the United States and their Government . . . . The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down . . . . It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government . . . .

Id. at 451. Justice Daniel similarly rejected the existence of "some implied and paramount authority of a supposed international law . . . from which independent and sovereign States can be exempted only by a protest." "Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and an exemption from all claims by any extraneous power . . . ." *Id.* at 485.

1316. *Id.* at 401.

1317. *Id.* at 432.

agreed that the Constitution plainly granted the power to acquire new territory as part of the power to admit new states and that the power of Congress to govern territories "unquestionabl[y]" arose as "the inevitable consequence of the right to acquire territory."[1318] This implied power to govern the territories, however, must be exercised consistent with the Constitution and did not include the power to prohibit slavery:

> [W]hen the Territory becomes a part of the United States, the Federal Government . . . enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it.[1319]

Like Marshall in *Loughborough*, Taney concluded that the various protections of the Bill of Rights were general prohibitions which "extend[ed] to the whole territory over which the Constitution gives [Congress] power to legislate . . . and place[d] the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States . . . ."[1320]

Accordingly, in language that would become important in the *Insular Cases*, Taney rejected the possibility that the U.S. could exercise colonial authority:

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States . . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character.[1321]

1318. *Id.* at 443.

1319. *Id.* at 449–50.

1320. *Id.* at 450–51. These rights specifically included the prohibition against the establishment of religion, abridgement of freedom of speech, of the press, or the right to peaceably assemble and to petition the government, denial of the rights to bear arms or trial by jury, compelling anyone to be a witness against himself, quartering soldiers, taking private property for public use, or depriving a citizen of his liberty or property.

1321. *Id.* at 446. *See also id.* at 448 ("A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form."). Justice Campbell concurred in this view:

> I look in vain among the discussions of the time [of the Constitution's adoption], for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an *empire*, and which had no restriction but the discretion of Congress. . . . *I find nothing to authorize these enormous pretensions* . . . .

Id. at 505 (Campbell, J., concurring in the judgment) (emphasis added).

Taney thus denied that the Constitution gave the United States any enumerated power to govern territories other than in preparation for statehood. But consistent with his social contract views, his focus with respect to the affirmative constraints imposed by the Bill of Rights was primarily on citizenship. "[C]itizens of the United States who migrate to a Territory belonging to the people of the United States," he wrote, "cannot be ruled as mere colonists."[1322] Because Sanford was a citizen and the Constitution applied to the territories of the United States, Taney concluded that the Fifth Amendment Due Process Clause prohibited Congress from terminating property rights in slaves.

The concurring and dissenting Justices apparently agreed with Taney's view that the Constitution applied to the territories.[1323] Taney failed to garner a majority, however, for the view that the Territory Clause was restricted to the original U.S. territories.[1324] In dissent, Justices McLean and Curtis both considered Congress's power over territories to be extremely broad—certainly broad enough to prohibit slavery. Curtis argued that Congress's discretion was unlimited "save those positive prohibitions to legislate, which are found in the Constitution."[1325] Congress's rules under the Territory Clause must be "needful," but whether or not this requirement was satisfied was a political, not a judicial, question: "Whatever Congress deems needful is so, under the grant of power."[1326] Nevertheless, Taney's opinion cast a sufficient pall over the Territory Clause as a source of authority to govern later acquired territories to deter courts from relying on it. Most decisions for the remainder of the century were highly ambiguous about the source of authority for territorial governance, and many turned to implied or inherent powers.

In his history of the *Dred Scott* case, Benton characterized the Court's assumption that the Constitution extended to the territories as "the great fundamental error of the Court, . . . a naked assumption without reason to

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1322. *Id.* at 447. Taney also acknowledged that the United States could acquire territory with inhabitants unfit for immediate statehood and govern it as a territory "until it was settled and inhabited by a civilized community capable of self-government." *Id.* at 448.

1323. *See, e.g.*, *id.* at 542 (McLean, J., dissenting) ("In organizing the government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."); *id.* at 614 (Curtis, J., dissenting) (arguing that Congress's power to legislate for the territories, like all other legislative powers of Congress, "finds limits in the express prohibitions on Congress not to do certain things" such as pass ex post facto laws or bills of attainder, "and so in respect to each of the other prohibitions contained in the Constitution").

1324. Three members of the majority and both dissenters rejected Taney's position. *See id.* at 489 (Daniel, J., concurring); *id.* at 501 (Campbell, J., concurring); *id.* at 519–21 (Catron, J., concurring); *id.* at 540–42, 544 (McLean, J., dissenting) (Congress's power to legislate arose from the Territory Clause and the power to conquer territory); *id.* at 613 (Curtis, J., dissenting) (ridiculing the majority for rejecting the Territory Clause but nevertheless implying the authority to govern from "suppositious powers" found nowhere in the Constitution).

1325. *Id.* at 623.

1326. *Id.* at 614–16 (Curtis, J., dissenting); *see also id.* at 540–42 (McLean, J., dissenting).

support it, or a leg to stand upon—condemned by the Constitution itself, and the whole history of its formation, and administration."[1327] The proposition that the Constitution applied to the territories of the continental United States should have been fairly unproblematic, however, since after the Louisiana Purchase, the enabling statutes under which the western territories were organized all provided that no territorial laws could be adopted that were inconsistent with the Constitution.[1328] It is not clear whether the drafters of these provisions believed the Constitution would apply in their absence, though the consistency of these provisions appears to reflect the belief that the government had no constitutional authority to acquire and govern territory other than on terms of citizenship and preparation for statehood. And while some could have contended that the application of the Constitution to these regions was simply a matter of legislative grace, the decision in *Dred Scott* foreclosed this argument. If the Due Process Clause had applied to the Indiana Territory only as a matter of legislative grace, Congress presumably could have overriden that provision in adopting the Missouri Compromise. No party pressed such an argument, however, and the Supreme Court decision extinguished it.

E. Post-Civil War Consensus

The Fourteenth Amendment was adopted to reverse Taney's holding that blacks could not be citizens, and it appeared to confirm the view that the Constitution applied uniformly to the territories by extending birthright citizenship to all persons "subject to the jurisdiction" of the United States. In the *Slaughter-House Cases*,[1329] the Court (per Justice Miller) recognized that the Amendment bestowed citizenship on inhabitants of the territories who resided outside of any state. The Thirteenth Amendment's prohibition against slavery and involuntary servitude "within the United States, or any place subject to their jurisdiction," however, was more ambiguous regarding territorial scope.[1330] This distinction between the "United States" and places "subject to [U.S.] jurisdiction" could be read as confirming that the Amendment applied both to the sovereign domain of the United States and to any forts, consuls, or vessels abroad. It could have been intended to clearly include the seceded southern states when the amendment was adopted in January 1865. Or it could be interpreted, as it would be in the *Insular Cases*, to mean that the "United States" to which the Constitution applied was some

1327. THOMAS HART BENTON, A HISTORY AND LEGAL EXAMINATION OF THAT PART OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE 26 (photo. reprint 1969) (1857); BROWN, *supra* note 1152, at 276.

1328. *See supra* note 1229.

1329. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

1330. U.S. CONST. amend. XIII, §1.

geographic subset of the territories subject to U.S. jurisdiction and sovereignty.[1331]

The consensus that arose from *Dred Scott* regarding the Constitution's application to the territories continued unshaken for most of the nineteenth century. In the 1878 case of *Reynolds v. U.S.*,[1332] the Court acknowledged that the constitutional rights to an impartial jury, to confront witnesses, and to free speech applied to the territories while nevertheless upholding the statute criminalizing polygamy in the Utah territory against a First Amendment challenge. The same year, *Wilkerson v. Utah*[1333] acknowledged that the Eighth Amendment applied to the Utah territory. In *Callan v. Wilson*,[1334] the Court held that the constitutional right to jury trial "was demanded and secured for the benefit of all the people of the United States" over the government's objection that the right was limited to the several states.[1335]

The 1889 case of *Kennon v. Gilmer*[1336] held that the Seventh Amendment right to jury trial was "in full force in Montana, as in all other organized territories of the United States." *American Publishing Company v. Fisher*[1337] did not address the source of the Constitution's application, but the Court held that "either the Seventh Amendment to the Constitution, or these acts of Congress, or all together, secured to every litigant in a common law action in the courts of the Territory of Utah the right to a trial by jury . . . ."[1338] Two weeks later, however, the Court held that the Seventh Amendment itself required the territorial legislature to provide for unanimous jury verdicts in civil trials, finding that "*the act of Congress could not impart the power to change the constitutional rule*, and could not be treated as attempting to do so."[1339]

1331. *E.g.*, Downes v. Bidwell, 182 U.S. 244, 251 (1901) (Brown, J.) (asserting that the Thirteenth Amendment demonstrates "that there may be places within the jurisdiction of the United States that are no part of the Union"); *id.* at 336 (White, J., concurring) (same). *But see id.* at 358 (Fuller, C.J., dissenting) (concluding that the Amendment's language was included "out of abundant caution" to include the rebellious southern states and would have applied to the territories even without the phrase "or any place subject to their jurisdiction").

1332. 98 U.S. 145 (1878).

1333. 99 U.S. 130, 137 (1878) (rejecting the claim that a sentence that a convicted capital defendant "be publicly shot until [he was] dead" violated the Eighth Amendment Cruel and Unusual Punishment Clause).

1334. 127 U.S. 540 (1887).

1335. *Id.* at 548, 550.

1336. 131 U.S. 22, 28 (1889) (citing Act of May 26, 1864, ch. 95, §13, 13 Stat. 91).

1337. 166 U.S. 464 (1897).

1338. *Id.* at 467–68.

1339. Springville v. Thomas, 166 U.S. 707, 708–09 (1897) (emphasis added).

Particularly illuminating was the decision in *Thompson v. Utah*,[1340] in which the Court held that the right to criminal jury trial required territorial juries comprised of twelve persons. Writing for the Court, Justice Harlan observed that it was "beyond question" that the provisions of the Constitution relating to trial by jury in common-law and criminal cases applied "to the Territories of the United States."[1341] Even though Utah, once admitted as a state, had sovereign power to provide for eight-member juries, in governing the territory, the United States was bound by the Constitution to require the twelve-member, unanimous juries required in federal courts.[1342] The 1900 decision in *Black v. Jackson*[1343] confirmed that the Seventh Amendment right to jury trial applied to the Oklahoma territory.

This consensus around the application of individual rights constraints began to erode, however, in the last decades of the 1800s, as the rhetoric of broad congressional power began to creep back into the Court's opinions. In the 1879 case of *National Bank v. County of Yankton*,[1344] for example, the Supreme Court held that Congress had authority to rescind an act of the Dakota territorial legislature, despite the lack of any provision for such power in the territory's organizing statute.[1345] "It is certainly now too late," the Court held, "to doubt the power of Congress to govern the Territories."[1346] In expansive language, the Court did not tie the power to any particular constitutional provision, but found its source in sovereignty:

> Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments . . . .[1347]

The Court nevertheless acknowledged that constitutional limitations applied: "Congress is supreme [over the territories] and . . . has all the powers of the people of the United States, *except such as have been expressly or by implication reserved in the prohibitions of the Constitution.*"[1348] The Court

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1340. 170 U.S. 343 (1898). The defendant Thompson had stolen a calf while Utah was a territory, and later was convicted by an eight-member jury as provided by the Utah Constitution after Utah became a state. Justices Brewer and Peckham dissented without opinion.

1341. *Id.* at 346–47.

1342. *Id.* at 355.

1343. 177 U.S. 349, 363 (1900).

1344. 101 U.S. 129 (1879).

1345. *Id.* at 133–34.

1346. *Id.* at 132.

1347. *Id.* at 133.

1348. *Id.* (emphasis added).

thus continued to recognize that the Constitution limited Congress's power over territories, despite Congress's sovereign supremacy in the area.

As in the Indian and alien contexts, the desire to exercise increasing authority both over the western territories and abroad led Congress to test the limits of its power, and by the 1890s, the Court turned to inherent powers rationales to uphold it.

F. The Early Inherent Powers Era

1. The Mormon Cases.—The struggle with the Mormons for the control of Utah formed an important early battleground for the inherent powers doctrine. As noted earlier, the Court had already upheld Congress's ban on polygamy in the Utah Territory,[1349] and the 1885 case of *Murphy v. Ramsey*[1350] addressed the constitutionality of an act of Congress which prohibited bigamists and polygamists from voting.[1351] Writing for the Court, Justice Matthews rejected the claim that the law unconstitutionally abrogated the right to vote that previously had been bestowed by Congress, and, as in *Yankton*, espoused a theory of broad national authority:

> The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion . . . all the discretion which belongs to legislative power is vested in congress . . . subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms.[1352]

The Court invoked social contract-membership themes and the preservation of American civilization to establish territorial inhabitants as second-class citizens. Congress enjoyed discretion to bestow or abridge suffrage upon inhabitants of the territories as it deemed expedient, the Court maintained, because residents of the territories were only modified participants in the American compact. "The right of local self-government . . . belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained and to whom by its terms, all power not conferred by it upon the government of the United States, was expressly reserved."[1353] While territorial inhabitants enjoyed the same personal and civil rights as other citizens, "their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United

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1349. *See* Reynolds v. United States, 98 U.S. 145 (1878).

1350. 114 U.S. 15 (1885).

1351. *Id.* at 17; Act of Mar. 22, 1882, ch. 46, § 8, 22 Stat. 3, *repealed by* Act of Dec. 8, 1983, Pub. L. 98-213, §16, 97 Stat. 1462, 1463.

1352. *Ramsey*, 114 U.S. at 44.

1353. *Id.*

States."[1354] In this case, the abrogation of the right to vote served the important goal of establishing a commonwealth founded on the holy state of matrimony, "the sure foundation of all that is stable and noble in our civilization."[1355] Other than its rooting in Christianity, the holding itself was not particularly remarkable. The Court continued to recognize, at least in the abstract, that constitutional constraints limited congressional action in the territories, but simply recognized that the Republican Guarantee Clause did not prohibit the legislation.

In the 1890 ease of *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*,[1356] the Court upheld the power of Congress to rescind the charter of the Mormon Church[1357] and to forfeit the Church's property in enforcing the anti-polygamy statutes.[1358] The Church contested the law as an arbitrary taking of property without due process in violation of the Fifth Amendment, which it contended constrained Congress in the territories.[1359] Like the parties in *Chae Chan Ping* and *Lone Wolf*, the Church also contended that Congress lacked authority to rescind its vested property rights.[1360]

The United States, in turn, asserted a modest sovereign authority over the territories that was both derived from and constrained by the Constitution.[1361] The government contended that the power to legislate arose from the Territory Clause and the power to acquire, that Congress had reserved the power to nullify territorial legislation in Utah's organic act, that the Mormon Charter violated the Establishment Clause, and that the promotion of polygamy constituted abuse of corporate powers warranting dissolution under Congress's poliee powers.[1362]

Writing for the Court, however, Justice Bradley asserted a sweeping vision of absolute congressional power:

> The power of Congress over the Territories of the United States is general and plenary . . . . The incidents of these powers are those of national sovereignty, and belong to all independent governments. The

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1354. *Id.* at 44–45 (citing Nat'l Bank v. County of Yankton, 101 U.S. 129 (1879); Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828)).

1355. *Id.* at 45.

1356. 136 U.S. 1, 42, 64–65 (1890).

1357. The Charter had been granted by the preexisting Mormon State of Deseret. *Id.* at 3.

1358. The statute authorized the Attorney Gencral to forfeit the property of the Mormon Church without any criminal proeeeding establishing a violation of the anti-polygamy statutes. The proceeds from the forfeited property were to be used for the common schools of the territory. *Id.* at 7.

1359. *See generally* Brief for the United States, *Latter-Day Saints* (Nos. 1031, 1054).

1360. Brief for Appellants at 32–41, *Latter-Day Saints* (Nos. 1031, 1054).

1361. *See* Brief for the United States at 4–5, *Latter-Day Saints* (Nos. 1031, 1054).

1362. *Id.* at 4–5, 7–8, 15–17.

> power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty.[1363]

Citing the decisions in *American Insurance*, *Benner v. Porter*, *National Bank v. Yankton*, and *Murphy v. Ramsey*, and like Justice Miller's decision in *Kagama*, Bradley invoked the absence of any competing (e.g., state) sovereignty in the territories to conclude that Congress's power must be "complete."[1364] "No State of the Union had any such right of sovereignty over them; no other country or government had any such right."[1365]

In response to the observation in *Murphy* that this sovereign power was restricted by the Constitution, Bradley now added his own ambiguous innovation:

> Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; *but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.*[1366]

Bradley otherwise did not acknowledge the Church's constitutional claims and did not expressly recognize that the Constitution either provided the source of congressional authority or imposed any constraint upon it.[1367] In light of Congress's supreme and complete authority over the territories, he concluded that Congress could revoke or repeal any enactments of the local "State of Deseret," including the organizational charter of the Mormon Church.[1368]

The decision provoked objection from the enumerated powers-limited government adherents on the Court. Chief Justice Fuller dissented with Justices Field and Lamar, arguing that Congress enjoyed only enumerated, not inherent, authority, and that the Constitution did not authorize Congress to confiscate property in this manner:

> In my opinion Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, express or implied, in that instrument .... [The property's] diversion under this act of Congress is in contravention of specific limitations in the Constitution; unauthorized, expressly or by implication, by any of its provisions; and in disregard of the

1363. *Latter-Day Saints*, 136 U.S. at 42.
1364. *Id.* at 45.
1365. *Id.* at 42–43.
1366. *Id.* at 44 (emphasis added).
1367. *Id.*
1368. *Id.* at 46.

> fundamental principle that the legislative power of the United States . . . is delegated and not inherent.[1369]

Latter-Day Saints thus injected tremendous ambiguity into both the constitutional source of authority over the territories and the applicability of constitutional limits. Bradley did not elaborate on his conclusion that constitutional limits applied as a matter of "inference" and "general spirit" rather than "direct application," but the reasoning was quite contrary to the conclusions in both *Loughborough* and *Dred Scott* that general constitutional limits expressly applied.

2. Overseas Expansion and Extraterritoriality.—Church of Latter-Day Saints, together with the Indian and alien cases discussed earlier, set the stage for America's experiment with imperial expansion in the last decade of the 1800s. Like the alien exclusion cases, the cases discussed in this section—involving the exercise of U.S. jurisdiction over guano islands in the Caribbean and U.S. consular courts abroad—raised the question of the Constitution's application beyond the borders of the United States.

a. Jones v. United States.—The same year as the *Latter-Day Saints* decision, the Court in *Jones v. United States* invoked a variation of the discovery doctrine to hold that the United States, as a result of nationhood, could exercise criminal jurisdiction over its overseas possessions.[1370] Under the 1856 "Guano Island" Act, Congress had authorized the President to assert U.S. sovereignty over unoccupied guano islands in the Caribbean and extended U.S. criminal jurisdiction to the islands.[1371] The territories so discovered were viewed as "appertaining to" the United States, and jurisdiction could be relinquished when the guano recovery was completed.[1372] Henry Jones was a U.S. national who had been tried and convicted by a federal jury in Maryland for capital murder committed during a labor dispute on the Caribbean island of Navassa.[1373] Jones did not raise any individual rights challenges to his conviction, but instead contested the ability of Congress to legislate for territories that were neither part of the territorial

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1369. *Id.* at 67–68.

1370. Jones v. United States, 137 U.S. 202, 212–13 (1890).

1371. Act of Aug. 18, 1856, ch. 164, § 1, 11 Stat. 119, provided that when any citizen of the United States shall discover "a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, . . . said island, rock, or key may, at the discretion of the president of the United States, be considered as appertaining to the United States." The Aet further provided that "nothing in this act contained shall be construed obligatory on the United States to retain possession of the islands, rocks, or keys, . . . after the guano shall have been removed." *Id.* at § 4.

1372. *Id.*

1373. Jones, who was a black laborer, was charged with murdering a company officer during a revolt by the island's 137 black laborers against the 11-member white management. Transcript of Record at 26–30, *Jones* (No. 1143).

domain of the United States nor the "high seas."[1374] The United States in turn contended that Congress had the power to legislate, either under the Territory Clause[1375] or under the "inherent" authority to govern U.S. citizens recognized by international law which the government contended was bestowed by the Constitution.[1376] This power was the basis for consular courts abroad, the government contended, "and it is too late now to question the validity of [its] exercise."[1377]

Without any discussion of a constitutional source of authority, the Court fully embraced the government's international law argument:

> By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and . . . the nation . . . may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands.[1378]

The Court concluded that Congress had authorized the punishment of death for any murder committed in any land "under the exclusive jurisdiction of the United States" or on the high seas, and that this authorization was sufficient.[1379] Despite the government's willingness to seek a constitutional source of congressional authority, therefore, the Court further unhinged Congress's power from any constitutional roots.

b. In re *Ross*.—The following term, the Court held in *In re Ross* that the constitutional criminal protections of a jury trial and grand jury indictment did not apply to U.S. consular courts in Japan.[1380] Ross was a British seaman on an American merchant vessel who was charged with murdering a fellow crew member aboard the ship in Yokohama harbor. Eleven days after the incident, Ross was convicted and sentenced to death by hanging by a consular court comprised of the consul general and four U.S. citizens.[1381] The court had been created by a treaty between the United States

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1374. Brief for Plaintiff in Error at 4–5, 7, *Jones* (No. 1143). The Defendant also denied that the discovery was valid since Haiti had a prior claim to the territory and the island had no guano. *Id.* at 13. Haiti's 1856 claim to the island had not been acknowledged by the United States, since the United States refused to recognize the black-ruled island of Haiti until after the Civil War.

1375. Brief for Defendant in Error at 7–8, *Jones* (No. 1143).

1376. *Id.* at 8–9 ("The power . . . to enact laws for the government, trial, and punishment of American citizens for crimes wherever committed is inherent in Congress under the Constitution, as a like inherent power is vested in every other nation to supervise, try, and punish its own citizens or subjects."). The government contended that this power was recognized by the constitutional provision allowing Congress to designate the location of trials for crimes committed outside of any state. *Id.* at 10 (referring to U.S. CONST. art. III, § 2, cl. 3).

1377. *Id.* at 9.

1378. *Jones*, 137 U.S. at 212.

1379. *Id.* at 211–12.

1380. 140 U.S. 453, 464 (1891).

1381. *Id.* at 454.

and Japan, which provided that "Americans committing offenses in Japan shall be tried by the American consul general . . . and shall be punished according to American laws."[1382] The consular procedure was anomalous: had the crime been committed on the high seas, Ross, like Jones the year before, would have been entitled under federal law to a trial before a domestic U.S. court, with full constitutional protections.[1383] Within three months of the conviction, President Rutherford B. Hayes commuted Ross's sentence and sentenced him to life imprisonment at hard labor in the Albany, New York penitentiary.[1384] Ten years later, Ross brought a habeas challenge, arguing that his conviction violated the constitutional rights to grand jury indictment and to jury trial.[1385]

In the 1890 case of *Geofroy v. Riggs*,[1386] Justice Field had held for the Court that the treaty power was limited by the Constitution. Writing for a unanimous Court in *Ross*, however, Justice Field had no difficulty finding authority for the consular procedures in the treaty power. It had been "the uniform practice of civilized governments for centuries to provide consular tribunals [for their nationals],"[1387] Field reasoned, and the tribunals had been created out of necessity to protect the country's citizens in non-Christian and particularly in Muslim countries.[1388] Field argued that the United States enjoyed a treaty power equal to that of foreign governments, which included the power to establish consular courts:

> The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.[1389]

Pursuant to this authority, Congress had created consular courts and authorized them to enforce U.S. civil and criminal laws "in conformity with

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1382. Treaty of June 17, 1857, art. IV, 11 Stat. 723; Treaty of July 29, 1858, art. VI, 12 Stat. 1056. Similar treaties had been entered with China, Siam, Egypt, and Madagascar.

1383. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112 ("[T]he trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.").

1384. *Ross*, 140 U.S. at 454.

1385. *Id.*

1386. Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument . . . . It would not be contended that it extends so far as to authorize what the Constitution forbids . . . .").

1387. *Ross*, 140 U.S. at 462.

1388. *Id.* at 463 ("[B]y reason of the barbarous and cruel punishments inflicted in those [Islamic] countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects . . . from the arbitrary and despotic action of the local officials.").

1389. *Id.*

the laws of the United States."[1390] Thus, the Constitution's Treaty Clause created the *source* of U.S. authority to establish consular courts abroad.

The power of the Congress to create consular courts, however, was not at issue in the case. The question was whether Congress had power to establish consular tribunals which enforced U.S. laws against U.S. citizens *without* affording the protections of the Fifth and Sixth Amendments. Field's answer with respect to the Constitution's individual rights provisions was one of strict territoriality:

> By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial . . . , and not to residents or temporary sojourners abroad. *The Constitution can have no operation in another country.*[1391]

Ross thus applied strict territoriality principles only to the Constitution's *constraints*, and not to the Constitution as a source of authority. In Field's view, although the Constitution was the source of Congress's authority abroad, the Constitution did not limit the exercise of that authority, which was governed by the treaty power and international law.

Field rejected Ross's contention that the American vessel constituted U.S. territory to which the Constitution applied. Field acknowledged that U.S. vessels were considered the territory of the United States for many purposes, but held that persons on board could not invoke the protection of the Fifth and Sixth Amendments "until brought within the actual territorial boundaries of the United States."[1392] Outside these boundaries, U.S. authority was governed only by the treaty conditions agreed to with the foreign government. Field avoided jurisdictional problems arising from the fact that Ross was British by concluding that the treaty provision creating jurisdiction over "Americans" referred to all "those who may be brought within the jurisdiction of the consular court for offenses committed in Japan."[1393]

Although *Ross* is often viewed as establishing strict territorial limits on the Constitution, the geographic limitations it imposed applied only to the Constitution's individual rights provisions. Field's reasoning rendered Ross both subject to complete U.S. authority under the treaty power and wholly unprotected by the U.S. Constitution. Through the treaty power, the United States stepped into an extraconstitutional realm governed only by the law of nations.

1390. *Id.* at 469.

1391. *Id.* at 464 (citation omitted and emphasis added).

1392. *Id.*

1393. *Id.* at 475.

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After the decisions in *Jones* and *Ross*, Supreme Court decisions regarding the Constitution's application to territories provided some support for each of the following propositions:

1) Congress had authority to govern territories under the Territory Clause (*Canter*, 1828);
2) Congress had inherent authority to govern territories pursuant to the sovereign power to acquire (*Canter*, 1828; *Dred Scott*, 1857; *Jones*, 1890);
3) The Constitution and U.S. laws applied automatically to newly acquired territory (*Loughborough*, 1820; *Cross v. Harrison*, 1853; *Dred Scott*, 1857);
4) Not all portions of the Constitution and U.S. laws applied to the territories (*Canter*, 1828; *Murphy v. Ramsey*, 1885);
5) The Constitution and U.S. laws did not apply to new territories until extended there by Congress (*Fleming v. Page*, 1850, dicta);
6) Constitutional protections might not apply to non-members of the constitutional compact in the territories (*Dred Scott*, 1857, dicta);
7) The letter of constitutional limitations did not restrict Congress in the territories (*Latter-Day Saints*, 1890, dicta);
8) Congress could act extraterritorially pursuant to the treaty power without constitutional limitation (*In re Ross*, 1891).

The argument that the Constitution's general restraints might not apply to U.S. territories, however, relied largely on dicta from *Fleming v. Page* and *Latter-Day Saints*. The established doctrine was that the Constitution applied to the domestic territories of the United States and that Congress enjoyed the combined authority of state and federal governments over U.S. territories subject to the constraints of the Constitution. Whether congressional authority derived from the Territory Clause, the power to acquire, or some other inherent authority remained unclear, and decisions after *Dred Scott* largely avoided the question. The only territory case in which the Court had held that the Constitution did not constrain congressional authority was *In re Ross*, which involved action in Japanese territory not subject to U.S. sovereignty. Thus, through the 1890s, the Court never held that constitutional constraints did not operate in territories subject to U.S. sovereignty.

G. The Spanish-American War and the Insular Possessions

U.S. territorial aspirations took a radical turn in the 1890s. With the exception of the Alaska Purchase in 1867 and the uninhabited Guano Island possessions, U.S. territorial acquisitions until the last decade of the century were limited to regions that were geographically contiguous with the United States. U.S. Presidents had attempted to annex other overseas territories in the post-Civil War period, but Congress had repeatedly rejected the

efforts.[1394] Furthermore, prior U.S. acquisitions had often been sparsely populated, subject to rapid settlement by white citizens, and (again, with the exception of Alaska) had been quickly placed on the road to statehood.

The closing of the U.S. frontier in 1890, the search of America's rising industrialists for overseas raw materials and markets, competition with European imperialist rivals, and impulses of manifest destiny, however, led U.S. expansionists of the 1890s such as Theodore Roosevelt and Alfred T. Mahan to turn their sights outward toward far-flung territories abroad. These territories were inhabited by peoples deemed culturally and racially inferior to the American Anglo-Saxon Christian majority, whom the elites of the 1890s hoped to civilize, humanize, Christianize, and otherwise bestow the benefits of advanced democratic society. In 1893, U.S. sugar planters staged a revolution in Hawaii in an effort to protect their holdings and trigger the islands' annexation to the Union. While that effort initially was thwarted by Grover Cleveland, Hawaii was formally annexed in 1898. In 1899, the United States acquired the Insular territories of Puerto Rico, Guam, and the Philippines, and established a protectorate over Cuba as a result of the Spanish American War—the "splendid little war," which, as Charles and Mary Beard observed, "made Manifest Destiny a little more manifest."[1395] The eastern Samoan islands were acquired by treaty with Great Britain and Germany in 1900; the Panama Canal treaty was negotiated following U.S. intervention in Colombia in 1903; and by 1904–05, President Roosevelt warned Latin American states that "chronic wrongdoing . . . may force the United States, however reluctantly . . . to the exercise of an international police power."[1396]

The acquisition of the Insular territories in the Spanish-American War, in particular, occurred at the height of America's robust imperial ambitions and became a focal point for a variety of political and economic pressures. The acquisition provoked extensive academic[1397] and political debate over

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1394. Congress had rejected efforts to annex the Danish West Indies (now the U.S. Virgin Islands), Santo Domingo, and Hawaii. Congress also had rejected two treaties for control of part of Samoa in the 1870s, but finally accepted a similar treaty in 1878. Jim Zwick, *An Empire is Not A Frontier: Mark Twain's Opposition to United States Imperialism*, 15 OVER HERE: REVIEWS IN AMER. STUD., Summer–Winter 1995, at 1.

1395. CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION: THE INDUSTRIAL ERA 362 (1930).

1396. RICHARD D. HEFFNER, A DOCUMENTARY HISTORY OF THE UNITED STATES 212 (1965).

1397. *See, e.g.*, James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 467 (1899) (arguing that the U.S. has the same authority to govern colonies as European powers); Carman S. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 304 (1898) (stating that territories must be placed upon the ordinary path to statehood); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899) (assuming that the Constitution applies wherever the flag of the Union flies); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 371 (1899) (arguing that the Constitution applies only to the states); A. Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155, 170–76 (1899) (distinguishing between incorporated and unincorporated territories). *See also* A. Lawrence Lowell,

the legal status of the territories, the scope of congressional authority over them, and the extent of constitutional protections,[1398] much as the Louisiana Purchase had done almost a century before. Xenophobes strenuously opposed the idea that the "alien and uncivilized peoples" of these new territories should attain American citizenship, and some considered the very authority of the United States to acquire the Philippines to turn on whether the government was limited by the powers enumerated in the Constitution or enjoyed additional powers recognized by international law.[1399] The Louisiana Purchase provided precedent for both sides of the debate, because it had initially been governed through authoritarian means, then quickly placed on the road to self-government and statehood. In the debates in Congress regarding the status of the island inhabitants, advocates of imperialism drew analogies to the subordinate status of native Americans to justify colonial rule over the new territories.[1400] Industrialists argued that the Constitution did not apply to justify protectionist tariffs against cheap Puerto Rican and Filipino goods.[1401] Imperial expansionists, jealous of the colonial possessions of Europe, viewed the acquisition as precedent for the United States' future possession of "Egypt and the Soudan, or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese Empire."[1402] On the other hand, anti-imperialists also invoked the racial inferiority of the Insular inhabitants to oppose the territories' continued possession. The political dilemma regarding what to do with the new territories was resolved in favor of imperialism with the reelection of President William McKinley in 1900, who had actively campaigned against William Jennings Bryan on a pro-colonial ticket.

The political ambivalence surrounding the acquisitions was reflected in the treaty of cession and the organizing legislation adopted for the Insular territories. Prior to the 1899 Treaty of Peace with Spain, every territorial treaty entered by the United States had provided that the new territory was to be "incorporated" into the United States for future admission as a state and that the inhabitants were to be afforded the rights and privileges of

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Colonial Expansion of the United States, ATLANTIC MONTHLY, Feb. 1899, at 145 (viewing territories as colonies to be administered by the United States). *See also* Akhil Amar, *Intertextualism*, 112 HARV. L. REV. 747, 782–88 (1998) (arguing that a necessity may justify an action under our constitutional structure but does not require one).

1398. *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 958–59 (1991).

1399. *See* E. STAWOOD, A HISTORY OF THE PRESIDENCY: 1897–1916, at 26 (1916) (recording the presidential argument that Filipinos were incapable of self-governance and the Democratic Senators' response that no constitutional power existed to acquire distant territory).

1400. *See, e.g.*, 33 CONG. REC. 707 (1900); 33 CONG. REC. 2618, 2620 (1900) (statement of Sen. Henry Cabot Lodge); 33 CONG. REC. 1062 (1900) (statement of Sen. Ross); 33 CONG. REC. 2097 (1900) (statement of Rep. Moody). Both President McKinley and Theodore Roosevelt portrayed the Philippines as inhabited by at least 84 warring "tribes." Zwick, *supra* note 1394, at n.14.

1401. Downes v. Bidwell, 182 U.S. 244, 374 (1901).

1402. *Id.*

citizenship. Since the Northwest Ordinance of 1787, moreover, Congress had provided that the Constitution and U.S. laws "shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States."[1403] Accordingly, in 1899, the Secretary of War reported that the Insular inhabitants "have acquired a moral right to be treated by the United States in accordance with the underlying principles of justice and freedom which we have declared in our Constitution, . . . not because these provisions were enacted for them, but because they are essential limitations inherent to the existence of the American government."[1404]

Difficulties with assimilation of new populations had been confronted before. The Louisiana Purchase and the acquisitions of Texas, New Mexico, and California from Mexico had involved the incorporation of French, Hispanic, and mulatto populations with different religions, cultures, languages, and legal traditions.[1405] Although the non-Christian, Asian Filipino population unquestionably was viewed as racially and culturally inferior to U.S. Anglo-Saxon elites, the inhabitants of Puerto Rico did not differ significantly from previously assimilated groups. In a radical break from past practice, however, the new treaty with Spain simply provided that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[1406] This language raised the question whether Congress enjoyed plenary authority to legislate for these territories. When the Foraker Act,[1407] which established a government for Puerto Rico, was reported from committee, it contained a provision conferring citizenship upon the residents of Puerto Rico.[1408] This provision was eliminated by the Senate, however, and the final

1403. Rev. Stat. § 1891 (1876).

1404. Brief for Plaintiff at 13, *Downes* (No. 507) (quoting the 1899 Annual Report of the Secretary of War, at 26).

1405. These concerns figured particularly prominently in the admission of New Mexico and Arizona as states. The predominance of Spanish-speaking Mexican Americans in New Mexico led to Arizona's rejection of a proposal that the two territories be admitted as a single state and delayed New Mexico's admission until 1912. *See Language Rights and New Mexico Statehood, in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 59 (James Crawford ed., 1992).

1406. Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, art. IX, para. 2, 30 Stat. 1754, 1759 [hereinafter Treaty of Paris].

1407. (Foraker) Act of Apr. 12, 1900, ch. 191, 31 Stat. 77 (1900) (codified as amended at 48 U.S.C. § 731 (2002)).

1408. Senator Foraker, in introducing the Act, also had argued that Congress was bound by constitutional constraints, since "[t]hese limitations [were] placed upon the exercise of legislative power without regard to the place or the people for whom the legislation in a given ease may be intended." Brief for Plaintiff at 13, *Downes* (No. 507) (quoting S. REP. NO. 56-249 (1900), on the bill for temporary civil government for Puerto Rico).

act instead provided that the inhabitants of Puerto Rico would "constitute a body politic under the name of The People of Porto Rico."[1409]

The legal status of the Philippines and its inhabitants was particularly problematic due to the geographic remoteness of the territory; the racial, cultural, and religious differences of the population; and their revolt against U.S. rule.[1410] Moreover, annexation of the Philippines necessarily meant subjugated colonial rule, since no one advocated Filipino statehood.[1411] Following the treaty with Spain, the U.S. Senate passed a single house resolution stating that the treaty "is not intended to incorporate the inhabitants of the Philippine islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States."[1412] In establishing a temporary government for the Philippines in 1902, Congress expressly provided that Section 1891 of the Revised Statutes of 1878, which applied the Constitution to the organized territories, would not apply,[1413] and withheld the rights to bear arms and to jury trial.[1414]

The exceptional treatment of the new territories was justified in Congress on the now-familiar principles of social contract theory, U.S. sovereignty, and territoriality. In the 1898 debates regarding the Insular territories, Republican Senator Platt of Connecticut inverted the enumerated powers doctrine and portrayed the Constitution as setting forth the powers dedicated to the *states* and the people, with all remaining sovereign powers reserved to the national government. The United States, according to Platt,

> possesses every sovereign power not reserved in its constitution to the State or to the people: that the right to acquire territory was not reserved and is, therefore, an *inherent sovereign right: that it is a right upon which there is no limitation and with regard to which there is no qualification*, that in certain instances the right may be inferred from specific clauses in the Constitution but that *it exists independent of the clauses*: that in the right to acquire territory is found the right to

1409. Downes v. Bidwell, 182 U.S. 244, 348 (1901) (quoting the Foraker Act).

1410. Although the United States purported to purchase the Philippines from Spain, the Philippines had established a republic following Spain's withdrawal, and U.S. authority was only asserted through the forcible subjugation of the republic in a war that officially lasted from February 1899 until 1902. *See* Saito, *supra* note 50, at 444. The U.S. governed the islands militarily from the 1898 occupation until the president created the Philippine Commission in 1900. Instructions of the President dated Apr. 7, 1900, Public Laws and Resolutions of the Philippine Commission, 6–9 *discussed in* Kepner v. United States, 195 U.S. 100, 122–24 (1904).

1411. LEIBOWITZ, *supra* note 1149, at 20.

1412. 32 CONG. REC. 1846 (1900).

1413. Act of July 1, 1902, ch. 1369, 32 Stat. 691, 692 ("The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.").

1414. *Id.* § 5, 32 Stat. at 692. Congress otherwise provided the Philippines with a Bill of Rights including most basic constitutional protections.

> govern it: that *as the right to acquire is a sovereign and inherent right, the right to rule is a sovereign right not limited in the Constitution.*[1415]

Platt's position echoed that of the most extreme proponents of inherent powers in the Indian and alien cases—that the United States enjoyed the sovereign powers of other nation states in a manner unlimited by the Constitution.

The question whether the United States exercised inherent, extraconstitutional power over the territories soon came before the Court in the *Insular Cases*, a term which refers to a series of decisions between 1901 and 1905 regarding the application of U.S. tariff laws[1416] and constitutional criminal provisions[1417] to the new territories. Ultimately, the Supreme Court did not entirely embrace Platt's version of the inherent powers doctrine. But the Court's vision of a national government enjoying largely unlimited authority over unincorporated territories was strongly influenced by inherent powers principles and exempted the new territories from most ordinary constitutional protections. In the course of resolving national authority over the new territories, the Court revisited U.S. territorial doctrine from the Louisiana Purchase forward, drawing repeatedly from Chief Justice Marshall's opinion in *Johnson v. M'Intosh* that sovereign states could govern conquered territories as they saw fit. The decisions that resulted were largely motivated by the juxtaposition of an expansionist desire to acquire territory in the far reaches of the earth, with all the benefits of commerce and international status that this entailed, and a xenophobic desire not to allow the inhabitants of such regions to partake of the American birthright.

The U.S. occupation of Cuba provided the prelude to the *Insular* decisions. The Spanish-American War had been fought ostensibly to liberate the Cuban people from the abhorrent conditions under which they were held by Spain, which shocked the moral sense of the American people and constituted a "disgrace to civilization."[1418] During the war, the United States occupied Cuba, an occupation which was authorized to continue by the treaty

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1415. 31 CONG. REC. 6584 (1898) (emphasis added).

1416. *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901) (following *De Lima*); Dooley v. United States, 182 U.S. 222 (1901) (*Dooley I*); Armstrong v. United States, 182 U.S. 243 (1901) (following *Dooley I*); Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 183 U.S. 151 (1901) (*Dooley II*); The Diamond Rings, 183 U.S. 176 (1901).

1417. *See, e.g.*, Territory of Hawaii v. Mankichi, 190 U.S. 197 (1903) (finding that the conviction of a Hawaiian citizen is valid without a grand jury indictment or jury trial); Kepner v. United States, 195 U.S. 100 (1904) (finding double jeopardy protections applicable based on statute); Dorr v. United States, 195 U.S. 138 (1904) (finding no right to jury trial absent a congressional statute).

1418. Joint Resolution of Apr. 20, 1898, 30 Stat. 738 (authorizing the use of force to liberate Cuba). The resolution provided that "the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." *Id.* at 739.

of peace, although the United States disclaimed any permanent sovereignty over the territory. The President appointed a military governor for the island, under the Secretary of War, who created various departments of government and established a supreme court for Cuba. The military governor declared a number of new laws and otherwise announced that existing Spanish laws would remain in force. The legality of this provisional government was challenged in the little-known case of *Neely v. Henkel*,[1419] which involved the extradition of a U.S. citizen to Cuba to stand trial under the U.S. military government for crimes committed in Cuba. Neely argued that the United States government lacked authority to try a U.S. national for violating laws promulgated by the United States in territory subject to U.S. sovereignty without affording him the Constitution's criminal procedural protections.[1420] The case thus involved a variation on both *In re Ross* and *Fleming v. Page*, since a treaty of peace had been ratified and sovereignty formally relinquished to the temporary occupation of the United States.[1421]

In an opinion for the Court which cited no legal authority, Justice Harlan rejected Neeley's claim. Harlan reasoned that because the United States had disclaimed any permanent occupation of the territory, Cuba remained a "foreign" country within the meaning of the extradition act, although Cuba was to be treated as conquered U.S. territory by the outside world.[1422] Harlan accordingly concluded that constitutional criminal protections did not apply, because "those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."[1423] Harlan observed that the United States could constitutionally extradite a U.S. national to stand trial in a foreign state, and simply ignored the facts that Cuba was subject to exclusive U.S. authority, that Neely was being tried for violating a U.S. law, and that the trial would be conducted by the U.S. military.

Neely undermined the limited government approach to the Constitution's territorial application in several ways that proved important to the *Insular* decisions. First, the case (like *Jones*) expressly recognized that territories could be subject to complete U.S. sovereignty (at least temporarily) without being part of the United States.[1424] Second, the decision recognized that the United States could conduct criminal proceedings in such territories without being subject to constitutional constraint.[1425] And finally,

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1419. 180 U.S. 109 (1900).

1420. *Id.* at 122.

1421. Treaty of Paris, *supra* note 1406, art. I, at 1755.

1422. *Neely*, 180 U.S. at 119–20 ("Cuba is a foreign territory. It cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States.").

1423. *Id.* at 122.

1424. *Id.* at 119–20.

1425. *Id.* at 122.

as in *In re Ross*, the decision held that U.S. citizenship was irrelevant to the Constitution's applicability, although Harlan accomplished this through the fiction that Neely was being tried by a foreign state.[1426] The primary difference presented by the *Insular Cases* was that Puerto Rico and the Philippines had been formally annexed by the United States.

1. De Lima, Dooley I, *and* American Diamond*: U.S. Law Applies to the Territories.*—Seven of the *Insular Cases* were considered by the Court in 1901. The Court's initial foray into the status of the new territories affirmed the principle, established since *Cross v. Harrison*, that U.S. law applied automatically to the territories upon their cession. *De Lima v. Bidwell*,[1427] *Dooley v. United States* (*Dooley I*),[1428] and *The Diamond Rings*,[1429] all addressed the question whether the new Insular territories remained "foreign countries" such that goods traded between the new territories and the United States were dutiable under U.S. tariff laws.[1430] Writing for a five-member majority in *De Lima*,[1431] Justice Brown held that upon the ratification of the treaty with Spain, Puerto Rico "became a territory of the United States" and had ceased to be a foreign country whose goods were subject to U.S. import tariffs.[1432] Other than the dicta in *Fleming v. Page*, Brown reasoned, there was no support since the Louisiana Purchase for the proposition "that a district ceded to and in the possession of the United States remains for any purpose a foreign country."[1433] A foreign country was "one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States,"[1434] and no affirmative legislation was necessary to make the region domestic territory once it was ceded to the United States.[1435] Without resolving the source of Congress's power over the territories,[1436] Brown

1426. *Id.* at 123 ("When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe . . . .").

1427. De Lima v. Bidwell, 182 U.S. 1 (1901) (presenting the question whether sugar imported from Puerto Rico into New York was dutiable as an import from a foreign country under the existing U.S. tariff laws).

1428. Dooley v. United States, 182 U.S. 222 (1901) (*Dooley I*) (addressing whether goods shipped from New York to Puerto Rico were subject to export duties).

1429. The Diamond Rings, 183 U.S. 176 (1901) (applying *De Lima* to conclude that the Philippines were not "foreign" for the purposes of U.S. tariff laws).

1430. *See* The Tariff (Dingley) Act of July 24, 1897 ch. 11, 30 Stat. 151 (providing that certain duties "shall be levied, collected, and paid upon all articles imported from foreign countries").

1431. Justice McKenna was joined by Justices Shiras and White. Justice Gray dissented separately on the grounds that the opinion contradicted the reasoning in *Fleming v. Page.*

1432. *De Lima*, 182 U.S. at 196.

1433. *Id.* at 194.

1434. *Id.* at 180.

1435. *Id.* at 198.

1436. *Id.* at 196 (noting Congress's uninterrupted exercise of the authority arises "not necessarily from the territorial clause of the Constitution, but from the necessities of the case").

concluded that "once acquired by treaty, [a territory] belongs to the United States, and is subject to the disposition of Congress."[1437]

In *Dooley I*, which was handed down the same day as *De Lima*, Justice Brown similarly concluded that upon the ratification of the treaty, Puerto Rico became a part of the United States and thus New York was no longer "foreign" such that its goods could be subject to foreign import duties in Puerto Rico.[1438] Prior to the treaty of peace, U.S. governance of Puerto Rico had been controlled by the international laws of war, rather than the Constitution.[1439] Upon the treaty ratification, however, "the United States ceased to be a foreign country with respect to Porto Rico," and such goods were entitled to free entry "until Congress otherwise constitutionally directed."[1440]

De Lima and *Dooley I* foreshadowed a major division in the Court over the ability of a treaty to bring new territories within the ambit of U.S. laws absent action by Congress, and, conversely, of the power of Congress to govern ceded territories outside the terms of the Constitution. In a division that would become familiar in the *Insular Cases*, Justices White, Gray, Shiras, and McKenna dissented in both cases. Writing in *De Lima*, Justice McKenna rejected the majority's analysis as overly simplistic. Puerto Rico, he argued, was neither foreign nor domestic, but enjoyed an intermediate status as an unincorporated territory subject to U.S. sovereignty, and was still subject to the tariff laws.[1441] As Justice White put it in *Dooley I*, the treaty had brought Puerto Rico under U.S. sovereignty, but had not made it "domestic" for purposes of the U.S. tariff laws.[1442] McKenna relied upon Taney's dicta in *Fleming v. Page* and Justice Johnson's circuit opinion in *American Insurance v. Canter* to conclude that "the government and laws of the United States do not extend to such territory by the mere act of cession."[1443]

As in the debates over the Louisiana Purchase, the dissenters argued from nativist and social contract principles that only Congress enjoyed the power to extend U.S. laws to a new territory and populace. The overriding question, they argued, was whether or not a particular populace was

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1437. *Id.* at 197.

1438. Dooley v. United States, 182 U.S. 222, 234 (1901) (*Dooley I*).

1439. *Id.* at 230–31 ("We . . . do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war . . . in fine, from the law of nations.") (citing 2 HALLECK, *supra* note 56, at 444).

1440. *Id.* at 235.

1441. *De Lima*, 182 U.S. at 201 (McKenna, J., dissenting).

1442. *Dooley I*, 182 U.S. at 237 (White, J., dissenting).

1443. *De Lima*, 182 U.S. at 210 (McKenna, J., dissenting).

sufficiently "civilized" to be incorporated into the American polity.[1444] Justice McKenna viewed this question as a political one, dedicated to the legislative department:

> There may be no ready test of the civilized and uncivilized, between those who are capable of self-government and those who are not, available to the judiciary . . . . Upon what degree of civilization could civil and political rights under the Constitution be awarded by courts? The question suggests the difficulties, and how essentially the whole matter is legislative, not judicial.[1445]

Thus, the dissenters objected to the contention that "by the self-operating force" of the treaty,[1446] the status of the ceded territories could have changed without action by Congress.[1447] They argued that the majority's expansive reading of the treaty power violated the constitutional role of the House of Representatives in establishing revenue laws[1448] and ran the "danger" that "savage tribes" would be "nationaliz[ed]" without congressional approval.[1449]

The dissenters also stressed that the United States' plenary power to determine the legal status of the territories was essential to the country's equal and independent status among states. The majority's analysis in *DeLima*, McKenna wrote, would "bind[] and cripple[]" the country's ability to make war and peace.[1450] By contrast, the dissenters' theory would "vindicate[] the government from national and international weakness" and make the United States equal among nations.[1451] Invoking the language of the Declaration of Independence, McKenna observed that the dissenters' vision

> enable[d] the United States to have—what it was intended to have—an "equal station among the Powers of the earth," and to do all "Acts and Things which Independent States may of right do." And confidently do, able to secure the fullest fruits of their performance. All powers of government, placed in harmony under the Constitution; the rights and liberties of every citizen secured—put to no hazard of loss or impairment; the power of the nation also secured in its great station, enabled to move with strength and dignity and effect among the other nations of the earth to such purpose as it may undertake or to such destiny as it may be called.[1452]

1444. *Id.*
1445. *Id.* at 219 (McKenna, J., dissenting).
1446. *Dooley I*, 182 U.S. at 238 (White, J., dissenting).
1447. *Id.* at 237–38 (White, J., dissenting).
1448. *Id.* at 238 (White, J., dissenting).
1449. *De Lima*, 182 U.S. at 219 (McKenna, J., dissenting).
1450. *Id.* at 218 (McKenna, J., dissenting).
1451. *Id.* at 220 (McKenna, J., dissenting).
1452. *Id.*

2. Downes v. Bidwell*: Limiting the Constitution's Application.*—The conclusion that U.S. laws were immediately applicable to the new territories proved very short-lived. By the time the Court decided *De Lima* and *Dooley I*, Congress had mooted the future impact of those holdings by passing the Foraker Act, which imposed a special duty on all goods traded between Puerto Rico and the United States.[1453] The tariff was quickly challenged as violating the constitutional requirement in the Uniformity Clause that "all duties, imposts, and excises shall be uniform throughout the United States."[1454] *Downes v. Bidwell* thus presented the question whether Puerto Rico was part of the "United States" for purposes of the Uniformity Clause.[1455] This question had been answered in the affirmative with respect to the District of Columbia in *Loughborough* and to the California territory in *Cross v. Harrison*. The tariff was supported by U.S. industry, which argued in an amicus brief before the Court that the power to impose special duties on goods from the new territories was necessary to protect domestic industry.[1456]

The briefs of the United States and the amici industrialists sought to justify denying constitutional protections to the new territories by arguing that the "United States" encompassed only the states, despite the Constitution's well-established application to the existing western territories.[1457] As a sovereign nation, the government contended, the United States possessed all the powers of acquiring and governing territory enjoyed by other nations,[1458] and the Constitution did not operate beyond the states absent its extension there by Congress.[1459] The government claimed that the Framers of the Constitution had intended to authorize the United States to govern subject colonies[1460] and that the statesmen who oversaw the Louisiana

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1453. (Foraker) Act of Apr. 12, 1900, ch. 191, 31 Stat. 77. Section 3 of the Act taxed goods traded between the United States and Puerto Rico at 15% of the duty imposed on foreign commerce. The duty was statutorily defined to expire in 1902 or upon the enactment of a local system of taxation by the Puerto Rican legislative assembly, whichever came first, and revenues from the statute were earmarked to support the Puerto Rican government. *Id.* § 4. The Act also imposed U.S. import tariffs on goods being imported into Puerto Rico from countries other than the United States. *Id.* § 2.

1454. U.S. CONST. art. 1, § 8.

1455. Downes v. Bidwell, 182 U.S. 244, 287 (1901).

1456. Amicus Brief of Industrial Interests in the States at 1, Goetze v. United States, 182 U.S. 221 (1900) (No. 340).

1457. Brief for the United States at 11, *Goetze* (No. 340) ("'The People' referred to [in the Constitution were] not the people of the Territories or of the outlying possessions of the United States, but the people of the several States, who ordained and established for themselves and their posterity the Federal Constitution.").

1458. *Id.* at 15, 58.

1459. *Id.* at 5. "The power of the United States to make by treaty the stipulations upon this subject common to other nations is one flowing out of its national sovereignty, and is not restrained by any implication from any provision contained in [the Constitution]." *Id.* at 66. "We search in vain through the Constitution and the first twelve amendments to find a single phrase or word indicating that that instrument was to have operation beyond the confines of the Union." *Id.* at 74.

1460. *Id.* at 9.

Purchase "had no doubts whatever as to the power of Congress to govern acquired territory on the basis of a colony or province, or as territory outside the Union."[1461] The government rejected the theory that the Constitution applied automatically to newly acquired territories as the invention of pro-slavery forces to "fasten[] slavery upon California and New Mexico beyond the power of Congress to disturb or abolish it."[1462] Taney's decision in *Dred Scott* upholding automatic application was dismissed as the "vagary of a diseased imagination,"[1463] which the government contended had been "ignored and completely overthrown by the subsequent decisions of the court, to say nothing of the tremendous results of the civil war."[1464] The government's position, of course, ignored the Court's holdings from as early as *Loughborough* that the Constitution's general clauses applied to the entire "American Empire," as well as the Court's consistent affirmance of the Constitution's application to territories in the four decades since *Dred Scott*.

The United States stressed in particular that the new inhabitants could not be made citizens. "[T]he Government can not be made to receive people as citizens except by its consent and cooperation; while it may acquire territory and thereby sovereignty over the inhabitants without admitting them to the status of citizens of the United States."[1465] The power to govern new populations as it saw fit was "one of the ordinary and necessary sovereign powers of an independent nation,"[1466] and led "to the exaltation of the dignity, influence, and welfare of the Union."[1467] "Why should this Government be considered to have less freedom of action in this matter than other nations?" the government asked.[1468] "Why should the framers of the Constitution have wished to put shackles on the national limbs, or to strip the nation of powers necessary to the preservation of its dignity and the maintenance of its material interests on an equality with the nations of the earth?"[1469] "To be called an American subject," the government argued, "is no disgrace."[1470]

The United States relied heavily on the Indian and alien cases to support its analysis, invoking *Johnson v. M'Intosh* for the proposition that sovereigns could govern conquered populations as they saw fit,[1471] and *United States v.*

1461. *Id.* at 10.

1462. *Id.* at 149.

1463. *Id.* at 150 (quoting 2 THOMAS H. BENTON, THIRTY YEARS IN THE SENATE 713, 714 (New York, D. Appleton & Co., 1854)).

1464. *Id.* at 152.

1465. *Id.* at 63.

1466. *Id.* at 4.

1467. *Id.* at 71.

1468. *Id.* at 59.

1469. *Id.* at 71–72.

1470. *Id.* at 72.

1471. *Id.* at 19–20 (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589 (1823)).

Kagama for the proposition that the United States enjoyed plenary authority over territorial inhabitants.[1472] The government pointed to the Indian and alien cases as evidence that the United States long had enjoyed authority to govern subordinate populations as subjects,[1473] and that the decision whether to bestow citizenship on any group lay in the absolute discretion of Congress.[1474] The government concluded: "If Congress may properly define the classes of emigrant or aboriginal inhabitants who may become citizens . . . why is it unreasonable or unjust to leave to their judgment and discretion the time, the terms, and the conditions upon which the inhabitants of lately foreign islands may be admitted to the same high status?"[1475] The United States' focus on citizenship begged the question before the Court, which was not whether the inhabitants must be made citizens but whether the U.S. Constitution and laws applied to the Insular possessions. The government's argument did speak to political concerns, however, because if the territories were part of the United States or "subject to the jurisdiction thereof," all persons born in the territories after their transfer would be citizens under the Fourteenth Amendment.

The amicus brief for the U.S. industrial interests argued against applying the Constitution to the territories in order to protect U.S. tobacco, sugar, and other interests which could not compete with the more productive tropical climates.[1476] The industrial interests asserted more overtly nativist theories than the United States,[1477] stressing the "distinct" and "semi-civilized" nature of the Insular inhabitants.[1478] U.S. industrial interests should not suffer, they argued, simply "because the United States happen[ed] to be forced . . . to take a cession of territory . . . inhabited by a semi-civilized people and hampered by conditions quite dissimilar with our own . . . ."[1479]

1472. *Id.* at 25–26 (citing United States v. Kagama, 118 U.S. 375, 379 (1886)).

1473. *Id.* at 68 ("How is this doctrine [that the Constitution applies automatically] to be reconciled with the exclusion of Indian tribes from citizenship, notwithstanding they are inhabitants of ceded country?"); *see also id.* at 60 ("The political status of native Indian tribes within territory acquired by the United States by treaty has been uniformly regarded as unaffected by the cession.").

1474. *Id.* at 71 ("It is within the undisputed power of our Government to exclude from its territory such aliens as it may deem undesirable. Why is it not equally within its power to define what persons may become citizens by cession of territory?").

1475. *Id.* at 69.

1476. Amicus Brief of Industrial Interests at 1, 60–64, *Goetze* (No. 340).

1477. The brief argued that, whereas prior territories had been scantily populated and easily assimilated, "[w]e have now *other and serious* conditions to deal with. The Union was of *States* for *their* protection first, and not—as too many seem to suppose, for the exercise of charity toward inhabitants who . . . come to us by war." *Id.* at 2. *See also id.* at 31 ("If all our territory is acquired to become States, especially the Philippines, it may not be long before the downfall of the Republic will be sounded.").

1478. *Id.* at 60 ("Suddenly and for the first time in our history the nation finds itself possessed of vast and even unexplored areas of *tropical* territory *populated* by millions of people of the Latin and Malay races, who have long been accustomed to monarchical or no governmental ideas and either not ruled at all or with despotic power; many of them only semi-civilized.").

1479. *Id.* at 19.

The position that the Constitution followed the flag would produce "[p]remature citizenship of millions of semi-civilized people, [and] their incorporation into the Union of States."[1480] All other colonial powers, the amici asserted, imposed duties on colonial products to protect their home industries.[1481] They admonished the Court to protect U.S. states and industries "even while we may be advancing to a supremacy that astonishes the world."[1482]

In short, both the United States and the industrialists argued in favor of extraconstitutional colonial rule of the new territories, disavowing a century of contrary practice and adjudication. The government relied on membership and social contract principles—that new populations could not be made part of the populace without the people's express consent—while the industrialists offered a more overtly racist and protectionist rationale.

The plaintiff in *Downes v. Bidwell*, who was represented by the Coudert Brothers firm,[1483] argued that because Puerto Rico was subject to complete U.S. sovereignty, it must be part of the United States, and the Constitution must constrain governmental action there.[1484] The plaintiff did not contend that the Constitution had been enacted for the people of Puerto Rico, but argued from limited government principles that the Constitution constrained governmental authority wherever it chose to act. "The question," in other words, was not "what newly annexed people or newly acquired territory have a right to demand, but what the organs of the Government chartered by the Constitution have a right to do."[1485] Citing Pomeroy's constitutional law treatise, the plaintiff urged: "If it were thought necessary that Congress should be hedged around with restrictions while it is legislating for the inhabitants of the States . . . how much more necessary that the same body should be restrained while legislating for the inhabitants of those districts and territories over which it has an exclusive control and undivided sway."[1486] The plaintiff dismissed the opponents' claims of expediency, noting that nothing had forced the U.S. to acquire the territories, and that "it is not a function of the Court to wrest the law from its true meaning in order to avoid

1480. *Id.* at 54.

1481. *Id.* at 63.

1482. *Id.* at 64.

1483. *See* VIRGINIA KAYS VEENSWIJK, COUDERT BROTHERS: A LEGACY IN LAW: THE HISTORY OF AMERICA'S FIRST INTERNATIONAL LAW FIRM, 1853–1993 (1994). As Gerald Neuman graciously pointed out, Frederic Coudert had rejected the Supreme Court Justiceship that was filled by Edward Douglass White. Had he accepted the offer, *Downes* could have been decided five to four the other way.

1484. Brief for Plaintiff, Downes v. Bidwell, 182 U.S. 244 (1900) (No. 507).

1485. *Id.* at 22.

1486. *Id.* at 18 (quoting JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 492 (New York, Hurd & Houghton, 1868)).

the inconvenience or even the distress that may result from a careless or wanton use or misuse of governmental powers."[1487]

The *De Lima-Dooley I* members now flipped positions as the *Downes* Court divided five to four to hold that Puerto Rico was not part of the "United States" for purposes of the Uniformity Clause. Writing alone to announce the judgment of the Court, Justice Brown concluded that the Foraker Act did not violate the Uniformity Clause, since that clause did not apply to the territory. Puerto Rico, he reasoned, was "appurtenant to and belonging to," but not "part of the United States."[1488] Like Taney, Brown viewed the Territory Clause as restricted to the original territories. Brown argued that the Constitution failed to address power over later acquired territories because the Framers could not have anticipated that America would grow into a vast, expansionist power. Like Taney, he also believed the power to govern new territories arosc inevitably from the power to acquire. Brown diverged from Taney, however, in urging that the powers of the United States over acquisition should be commensurate with those of other nations.[1489] Arguing from narrow social contract theory, Brown contended, "The Constitution was created by the people of the *United States*, as a union of *States*, to be governed solely by representatives of the States."[1490] Moreover, *In re Ross* had established that the Constitution had no extraterritorial application, "since it was ordained and established 'for the United States of America,' and not for countries outside of their limits."[1491]

Brown's openly nativist justification for his analysis echoed the industrialists' brief:

> It is obvious that in the annexation of outlying and distant possessions, grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate, and production, which may . . . be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.[1492]

Picking up on the government's concerns about citizenship, Brown's analysis was expressly designed to prevent dilution of the American birthright by uncivilized peoples:

> There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon

1487. *Id.* at 22.

1488. *Downes*, 182 U.S. at 287.

1489. *Id.* at 285–86 ("If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them.").

1490. *Id.* at 250.

1491. *Id.* at 269.

1492. *Id.* at 282.

> annexation, citizens of the United States, their children thereafter born, *whether savages or civilized*, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious.[1493]

The necessary inference, Brown argued, was that Congress's power to acquire new territory "was not hampered by the constitutional provisions."[1494]

Brown rejected the suggestion that such extraconstitutional and "unrestrained" power on the part of Congress would lead to despotic government.[1495] Instead "certain principles of natural justice inherent in the Anglo-Saxon character" would secure the territories against legislation contrary to their interests.[1496] Thus, Brown suggested that the population of Puerto Rico would be entitled to "certain natural rights," including the rights to religious opinion and public expression; freedom of speech and press; rights to liberty and property, access to the courts, due process, and equal protection; and immunity from unreasonable searches and seizures and cruel and unusual punishments.[1497] The fact that these protections would be enjoyed as a matter of natural, rather than constitutional, right, and dependent upon the discretion of Congress, did not concern him. "Large powers must necessarily be intrusted to Congress in dealing with these problems," he concluded, "and we are bound to assume that they will be judiciously exercised. That these powers may be abused is possible. But the same may be said of its powers under the Constitution as well as outside of it."[1498]

Brown's analysis was not a model of clarity, and elsewhere in his opinion, Brown suggested that certain constitutional provisions would apply to the territories. Here Brown distinguished between general constitutional prohibitions that limited Congress's power to act, "irrespective of time or place," and those which were geographically limited.[1499] Thus, Congress's power to act in the territories apparently was constrained by the prohibitions against bills of attainder and ex post facto laws, and possibly by the First Amendment.[1500] Brown declined to speculate further regarding "how far the bill of rights . . . is of general and how far of local application."[1501] He further acknowledged that even if regarded as aliens, under the holdings in *Yick Wo* and *Wong Wing*, the inhabitants should enjoy rights to life, liberty, and property.[1502] They would not, however, be entitled to citizenship,

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1493. *Id.* at 279 (emphasis added).
1494. *Id.* at 285.
1495. *Id.* at 280.
1496. *Id.*
1497. *Id.* at 282–83.
1498. *Id.* at 283.
1499. *Id.* at 277.
1500. *Id.*
1501. *Id.*
1502. *Id.* at 282–83.

suffrage, and the procedural protections in the Constitution which Brown considered "peculiar to Anglo-Saxon jurisprudence."[1503]

The concurring Justices were unwilling to so boldly abandon a century of constitutional theory and jurisprudence. Joined by Justices Shiras and McKenna, and apparently by Justice Gray,[1504] Justice White conceded from the outset that "[t]he government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument."[1505] Citing *Kagama*, White argued that the Constitution unquestionably had conferred upon Congress broad authority to govern territories at its discretion,[1506] and that whether this power was implied from the power to acquire territory or derived from the Territory Clause, "in either case the right is founded on the Constitution."[1507] White thus began from enumerated powers principles, while recognizing the Constitution as the source of a very broad power over territories.

As White recognized, the appropriate question accordingly was not whether the Constitution was applicable to the new territories, but whether any particular constitutional constraint applied[1508]—a question that White believed turned on "the situation of the territory and its relations to the United States."[1509] White's solution to this question distinguished between "incorporated" and "unincorporated" territories, and fundamental and non-fundamental constitutional rights. According to White, if a territory had not been expressly "incorporated" into the United States by treaty or by legislation, only fundamental constitutional protections applied.[1510] White concluded that the Uniformity Clause was not fundamental, and thus Congress's power to impose taxes on Puerto Rieo was not limited by the clause unless the territory had been "incorporated" into the United States.

Although White started from the premise that the Constitution applied to the territories, he ultimately concluded, like Brown, that U.S. authority over unincorporated territories was largely unlimited. Citing Chief Justice Marshall in *American Insurance v. Canter*, White urged that international law gave a sovereign authority to govern conquered territories as it saw

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1503. *Id.*

1504. Justice Gray concurred separately, but indicated that he agreed in substance with Justice White's opinion.

1505. *Downes*, 182 U.S. at 288 (White, J., concurring).

1506. *Id.* at 289–90 & n.4 (White, J., concurring).

1507. *Id.* at 290 (White, J., concurring).

1508. *Id.* at 292 (White, J., concurring).

1509. *Id.* at 293 (White, J., concurring).

1510. White distinguished between provisions of the Constitution which merely regulated a granted power and those absolute protections of liberty which "withdraw all authority on a particular subject." *Id.* at 295 (White, J., concurring). The latter, he believed, applied regardless of the status of a particular territory. *Id.* at 298.

fit.[1511] He then assumed that equivalent powers must be possessed by the United States.[1512] The contrary view that the Constitution prevented the United States from acquiring territory that was not subject to full constitutional protections rested "on the erroneous assumption that the United States under the Constitution is stripped of those powers which are absolutely inherent in and essential to national existence."[1513] The decisions in *Johnson v. M'Intosh*, *American Insurance*, *Church of Latter-Day Saints*, and others established that "the government of the United States, in virtue of its sovereignty, . . . has the full right to acquire territory enjoyed by every other sovereign nation."[1514] *In re Ross* supported his analysis by holding that Congress's power to create consular courts outside the United States derived from the treaty power and was not otherwise constrained by the Constitution.[1515] "Undoubtedly," White opined, "the power to carry on war and to make treaties implies also the exercise of those incidents which ordinarily inhere in them,"[1516] including all the powers of sovereign nations recognized under international law. White thus viewed the Constitution as bestowing on the government the full international law powers of discovery and conquest.

White's view of the constitutional constraints that applied to territories such as Puerto Rico and the Philippines ultimately appeared almost as broad as Justice Brown's. Although White maintained that at least fundamental rights applied to unincorporated territories, he did not indicate what provisions of the Constitution he considered fundamental. Moreover, like Brown, he elsewhere suggested that the Constitution imposed no express or implied limits on Congress's power in the territories, although the power might be limited by "inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended."[1517]

White's desire to preserve the power of the United States to govern territories outside of the Constitution's reach was motivated primarily by principles of nationalism and membership. Like Justice Field in *Chae Chan Ping*, White saw the power to determine U.S. membership as critical to the United States' independence as a sovereign state. To conclude that the United States could acquire territory peopled by "an uncivilized race" only if that territory became fully incorporated into the United States and entitled to citizenship, White argued, was "to admit the power to aequire and

1511. *Id.* at 300, 301–02 (White, J., concurring).
1512. *Id.* at 302 (White, J., concurring).
1513. *Id.* at 310–11 (White, J., concurring).
1514. *Id.* at 302–04 (White, J., concurring).
1515. *Id.* at 293–94 (White, J., concurring).
1516. *Id.* at 312 (White, J., concurring).
1517. *Id.* at 291 (White, J., concurring).

immediately to deny its beneficial existence."[1518] Such a policy would deny the United States the sovereign right to benefit from its conquests and render it "helpless in the family of nations."[1519]

Arguing from membership principles, White emphasized the right of the nation to protect the "birthright" of its citizens by denying citizenship to those "absolutely unfit to receive it."[1520]

> If the proposition be true [that acquisition by treaty automatically incorporates a territory into the United States], then millions of inhabitants of alien territory, if acquired by treaty, can, *without the desire or consent of the people of the United States*, speaking through Congress, be immediately and irrevocably incorporated into the United States, and *the whole structure of the government be overthrown.*[1521]

White ridiculed the proposition that "the Constitution of the United States has conferred upon the treaty-making power the absolute right to bring all the alien people residing in acquired territory into the United States and thus divide with them *the rights which peculiarly belong to the citizens of the United States.*"[1522] The "evil of immediate incorporation" would wreck the country's institutions and strip citizens of their birthright.[1523] Indeed, if anything, the Constitution precluded the possibility that, through mere exercise of the treaty power, the United States could "incorporate an alien people into the United States without the express or implied approval of Congress."[1524] Such a construction of the treaty power would eviscerate the role of the House of Representatives in determining the membership and boundaries of the United States.[1525] White reinterpreted the history of the Louisiana Purchase to argue that Jefferson's concern had not been that the United States lacked power to acquire and hold territory, but that the territory could not be *incorporated* into the United States by mere treaty, absent action by Congress.[1526] In direct contrast to the holdings in *De Lima* and *Dooley*, White argued that "an unbroken line of decisions" from Justice Marshall to Taney established that the treaty-making power could not bring new peoples or territory into the United States "without the express or implied assent of Congress."[1527]

1518. *Id.* at 306 (White, J., concurring).

1519. *Id.* (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595 (1823) and Jones v. United States, 137 U.S. 202, 212 (1890)) (emphasis added).

1520. *Id.*

1521. *Id.* at 313 (White, J., concurring) (emphasis added).

1522. *Id.* at 324 (White, J., concurring) (emphasis added).

1523. *Id.* at 312–13 (White, J., concurring).

1524. *Id.* at 312 (White, J., concurring).

1525. *Id.* at 313 (White, J., concurring).

1526. *Id.* at 322–33 (White, J., concurring).

1527. *Id.* at 338–39 (White, J., concurring).

Even if the spirit of the Constitution prevented the United States from acquiring territory that was not ultimately intended for statehood, White reasoned, the determination of what acquisitions were appropriate was "wholly a political question" dedicated to Congress, and not a subject for the courts.[1528] Like Brown, White concluded with the tortured formulation that "whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession."[1529]

White's theory of incorporation had been borrowed from the pages of the *Harvard Law Review*[1530] and had never previously been articulated by the Court. His distinction between constitutional rights that were fundamental versus procedural, however, echoed the Court's recent decisions concluding that only fundamental provisions of the Bill of Rights were binding on the states through the Due Process Clause.[1531] These incorporation decisions, however, had been grounded on the premise that the states, as separate and independent sovereigns, were not bound by all the provisions that were binding on the federal government. The Court had rejected the proposition that Congress, in legislating for the territories, could abandon such "non-fundamental" constitutional requirements as unanimous juries, even though the successor state legislatures were fully entitled to do so.[1532]

Like Brown, then, Justice White and his fellow concurring Justices conceived of Congress as enjoying a power over conquered peoples coterminous with that enjoyed by all sovereign nations and limited only by certain unidentified fundamental provisions of the Constitution. On its face,

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1528. *Id.* at 312 (White, J., concurring).

1529. *Id.* at 341–42 (White, J., concurring).

1530. *See* Lowell, *The Status of Our New Possessions*, *supra* note 1397 (distinguishing between incorporated and unincorporated territories); *see also* Lowell, *Colonial Expansion of the United States*, *supra* note 1397.

1531. *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884) (holding that the Fourteenth Amendment Due Process Clause does not require states to indict by grand jury in capital cases); Bolln v. Nebraska, 176 U.S. 83 (1900) (same); Maxwell v. Dow, 176 U.S. 581 (1900) (holding that the Fourteenth Amendment Due Process Clause does not require the state of Utah to provide 12-member juries in criminal proceedings). The Court upheld the state practices in these cases on the grounds that the constitutional provisions at issue were not fundamental rights necessary to due process, and Justice Harlan consistently dissented on the grounds that the Bill of Rights had been adopted to expressly define the fundamental rights of the polity against the government. For further discussion of the relationship between the incorporation doctrine and the Insular decisions, see Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years Of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1 (2001).

1532. *Compare* Thompson v. Utah, 170 U.S. 343 (1898) (holding that the Constitution obligated the Utah territory to provide 12-member criminal juries), *with Maxwell*, 176 U.S. at 581 (holding that the Constitution did not require the state of Utah to provide 12-member criminal juries).

White's analysis placed at least as much authority in the hands of Congress as had Justice Brown's and differed from Brown only in the view that Congress's authority originally derived from the Constitution, rather than being external to it. All members of the majority relied upon concepts of nationhood and membership to support their position, arguing that the United States must, as a matter of necessity, be able to govern the territorial inhabitants as subjects, since it was impossible that they should be given the benefits of American citizenship. This claim of impossibility ignored the alternative possibility (also presented by the alien cases) that the Constitution *itself* constituted the requisite popular consent for the admission of new inhabitants, and that if the United States did not want to extend the Constitution to the new territories, it need not acquire and govern them. Nothing had forced the United States to acquire the Insular territories. But under the dominant ideology of the age, a nation which lacked authority to acquire and govern territories as colonial subjects could not be considered a full sovereign. The majority's facile handling of this question was all too obvious to the dissenting Justices. As Justice Harlan wrote, "Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, *is a matter to be thought of when it is proposed to acquire their territory by treaty.* A mistake in the acquisition of territory . . . cannot be made the ground for violating the Constitution."[1533]

Justices Fuller, Harlan, Brewer, and Peckham dissented on the theory that Congress's power to tax Puerto Rico derived from the commerce power and was limited by the Uniformity Clause. Writing for the four, Chief Justice Fuller argued, as Marshall had in *Loughborough*, that the taxation power extended "to all places over which the government extends."[1534] In particular, the dissenters roundly criticized the majority for asserting that Congress possessed "unlimited power" over the territories.[1535] Chief Justice Fuller noted that the majority's analysis ignored the principle articulated by Halleck regarding the *American Insurance* decision that every nation holds new territory "subject to the constitution and laws of its own government, and not according to those of the government ceding it."[1536]

Fuller found little difference between the two positions articulated by the majority. Possibly in response to the majority's invocation of *In re Ross*, Fuller argued that whatever the authority of the United States in international relations, the governance of a U.S. territory was a matter of internal relations which the Constitution controlled:

1533. *Downes*, 182 U.S. at 384 (Harlan, J., dissenting) (emphasis added).

1534. *Id.* at 353 (Fuller, C.J., dissenting).

1535. *Id.* at 358 (Fuller, C.J., dissenting).

1536. *Id.* at 367 (Fuller, C.J., dissenting) (citing Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 225 (1845)).

> [I]n all international relations, interests, and responsibilities the United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law . . . . The source of national power in this country is the Constitution of the United States; and the government, *as to our internal affairs*, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.[1537]

Criticizing White's "occult" theory of "incorporation," Fuller argued:

> [T]he contention seems to be that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions . . . . That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power.[1538]

Harlan likewise viewed the concept of "incorporation" as an undefined, "occult" concept, "enveloped in some mystery which I am unable to unravel."[1539]

Fuller finally rejected the majority's concerns about Puerto Rican citizenship, noting that "[m]uch discussion was had at the bar in respect to the citizenship of the inhabitants of Porto Rico, but we are not required to consider that subject at large in these cases. It will be time enough to seek a ford when, if ever, we are brought to the stream."[1540] Fuller objected that the Court should not be swayed by the desire of U.S. industries for trade protection from cheap Puerto Rican products.[1541]

While joining Fuller's dissent, Justice Harlan also wrote separately to attack the Court's blanket abandonment of the enumerated powers doctrine and the Bill of Rights. "Congress has no existence and can exercise no authority outside of the Constitution," he wrote.[1542] The arguments of the majority would work "a radical and mischievous change in our system of

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1537. *Id.* at 369 (Fuller, C.J., dissenting) (emphasis added).

1538. *Id.* at 372–73 (Fuller, C.J., dissenting).

1539. *Id.* at 391 (Harlan, J., dissenting).

1540. *Id.* at 365 (Fuller, C.J., dissenting). Fuller may have genuinely believed that some interpretation of the Fourteenth Amendment could avoid bestowing natural-born citizenship on Puerto Ricans. Or he may have assumed, like many anti-imperialists, that if the government lost the *Downes* case, the prospect of citizenship for Puerto Ricans would result in Puerto Rico's independence.

1541. *Id.* at 374 (Fuller, C.J., dissenting).

1542. *Id.* at 379–80 (Harlan, J., dissenting).

government," replacing constitutional liberty with "legislative absolutism."[1543] Harlan further stated:

> This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments .... The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.[1544]

Harlan rejected both the theory that the nation could govern extraconstitutionally and the view that the Constitution embraced absolutist powers held by other nations.

> It is said . . . we may solve the question of the power of Congress under the Constitution by referring to the powers that may be exercised by other nations. I cannot assent to this view. I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired . . . in virtue of the Constitution.[1545]

Indeed, White's contention that the Constitution nominally applied to unincorporated territories simply gave with one hand what it took away with the other:

> The admission that no power can be exercised under and by authority of the United States except in accordance with the Constitution is of no practical value whatever to constitutional liberty if, as soon as the admission is made . . . the Constitution is so liberally interpreted as to produce the same results as those which flow from the theory that Congress may go outside the Constitution in dealing with newly acquired territories ....[1546]

Harlan dismissed Justice Brown's reliance on the "Anglo-Saxon character" as a source of governmental restraint. The drafters of the Constitution had declined to rely on such "inherent," "natural" limitations, and instead determined "that the only safe guaranty against governmental

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1543. *Id.* at 379 (Harlan, J., dissenting).
1544. *Id.* at 380 (Harlan, J., dissenting).
1545. *Id.* at 386 (Harlan, J., dissenting).
1546. *Id.* at 389 (Harlan, J., dissenting).

oppression was to withhold or restrict the power to oppress."[1547] Harlan found it equally useless to attempt, as the majority had, to parse the Constitution into "fundamental" and local prohibitions.[1548] There was no meaningful distinction, he argued, between the prohibition that Congress not pass ex post facto laws and the requirement that duties be uniform "throughout the United States."[1549] Harlan concluded, "How Porto Rico can be a domestic territory of the United States, as distinctly held in *De Lima v. Bidwell*, and yet . . . not embraced by the words 'throughout the United States' is more than I can understand."[1550]

3. Dooley v. United States.—*Dooley II*[1551] was a companion case to *Downes*, presenting the parallel question whether the Foraker Act duties on U.S. exports to Puerto Rico violated the constitutional requirement that "no tax or duty shall be laid on articles exported from any State."[1552] As in *Downes*, the Court construed the constitutional restriction narrowly to allow for broad, unregulated power of Congress over the new territories. Thus, Justice Brown argued, because Puerto Rico was no longer a foreign country under the decision in *De Lima*, goods delivered from the states to Puerto Rico were not "exports" within the meaning of the clause, and Congress had "full and paramount authority" to impose duties unlimited by that section.[1553] White argued that the holding in *Downes* was consistent with this ruling, because that case had recognized that Puerto Rico was subject to U.S. sovereignty and simply held that Pucrto Rico was not part of the United States for purposes of the Uniformity Clause.[1554]

As in *Downes*, Chief Justice Fuller dissented with Justices Harlan, Brewer, and Peckham, who chastised the majority for concluding that Puerto Rico was not domestic for purposes of the Uniformity Clause in *Downes* and was not foreign for purposes of the Export Clause here.[1555] The result of the Court's decisions, the dissenters argued, was that being neither foreign nor domestic, Puerto Rico had been placed into a deconstitutionalized zone where Congress could act as it wished.

The Supreme Court's 1901 *Insular* decisions transformed U.S. territorial law in a number of ways. Justice Taney's vision of the automatic application of the Constitution to newly acquired territory ultimately was replaced with the view that the United Statcs enjoyed powers to acquire and

1547. *Id.* at 381 (Harlan, J., dissenting).
1548. *Id.* at 383 (Harlan, J., dissenting).
1549. *Id.* at 383–84 (Harlan, J., dissenting).
1550. *Id.* at 386 (Harlan, J., dissenting).
1551. Dooley v. United States, 183 U.S. 151 (1901) (*Dooley II*).
1552. U.S. CONST. art. I, § 9.
1553. *Dooley II*, 183 U.S. at 157; *accord id.* at 163 (White, J., concurring).
1554. *Id.* at 164 (White, J., concurring).
1555. *Id.* at 173 (Fuller, C.J., dissenting).

govern territories comparable to those held by the imperial nations of Europe. U.S. sovereignty over such territories was complete, and by the end of 1901, it had become clear that only the fundamental provisions of the Constitution constrained congressional action in the overseas territories. Indeed, the doctrinal transformation was sufficiently radical to provoke Mr. Dooley's famous observation that "no matter whether th' constitution follows th' flag or not, th' supreme coort follws th' iliction returns."[1556]

While Justice White had justified the concept of incorporation as leaving the question of membership and the Constitution's application to Congress, the Court subsequently proved extremely reluctant to conclude that Congress had "incorporated" any of the recently acquired territories, and it declined to find that any contested constitutional provision was sufficiently fundamental to bind Congress in territories that the Court deemed unincorporated. Thus, in *Hawaii v. Mankichi*,[1557] a five-to-four majority[1558] held that Congress's determination in annexing the Hawaiian islands that Hawaii was "a part of the territory of the United States and [is] subject to the sovereign dominion thereof," and that only municipal legislation not "contrary to the Constitution of the United States" would remain in force,[1559] was not sufficient to apply the Fifth and Sixth Amendment grand and petit jury protections to Hawaii. The Court previously had held that these and related constitutional provisions applied to the domestic U.S. territories,[1560] and Justice Brown conceded that a literal interpretation of Congress's language would require applying the Fifth and Sixth Amendments to Hawaii.[1561] Brown concluded that this could not have been Congress's purpose, however, since applying these rights immediately would lead to "disastrous" results and imperil "the peace and good order of the islands."[1562] Without citation support or analysis, Brown concluded that although most of the

1556. Mr. Dooley (unrelated to the *Insular Cases* litigant) was a fictitious saloon keeper and political commentator created by newspaper columnist Finley Peter Dunne. *See* FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (Harper & Bros. 1906).

1557. 190 U.S. 197 (1903). The case involved a criminal defendant who had been judicially indicted, convicted of first degree manslaughter, and sentenced to 20 years hard labor by a majority of nine out of twelve jurors.

1558. The Court now included Justice Day, who had been Secretary of State in 1898 at the time of Hawaii's annexation. *Id.* at 224. Chief Justice Fuller, and Justices Harlan, Brewer, and Peckham dissented.

1559. 30 Stat. 750–51 (1898). On April 30, 1900, the Hawaiian territory was formally incorporated into the United States, and Congress formally extended the Constitution to Hawaii, making provision for grand jury indictments and unanimous jury verdicts. *See* ch. 339, §§ 5, 83, 31 Stat. 141–42, 157 (1901).

1560. *See supra* notes 1332–43 and accompanying text. *But see In re* Ross, 140 U.S. 453 (1891) (declining to apply Fifth and Sixth Amendment protections to consular proceedings abroad).

1561. *Mankichi*, 190 U.S. at 212.

1562. *Id.* at 214.

privileges and immunities contained in the Bill of Rights had applied to Hawaii upon annexation, the rights at issue were not "fundamental."[1563]

Justice White concurred with Justice McKenna and continued to press his incorporation theory. Ignoring the fact that the annexation had occurred before the Court had bestowed significance on the concept of incorporation, White concluded that the annexation had not incorporated Hawaii into the United States, and Congress, in authorizing the continuance of laws not "contrary to the Constitution," accordingly had only meant those fundamental provisions of the Constitution which necessarily were applicable to Hawaii.[1564] White cited *In re Ross* and the state incorporation doctrine cases[1565] for the proposition that the rights to grand and petit juries were not fundamental. Thus, even when Congress had purported to apply the Constitution, the Supreme Court majority refused to find its action controlling.

Chief Justice Fuller argued for the dissenters that the plain language of the 1898 resolution had applied the Constitution to Hawaii, and that Justice White's reasoning to the contrary rendered the statute utterly superfluous.[1566] Even under the *Downes* analysis, he argued, the Fifth and Sixth Amendment rights were fundamental and applied to Hawaii upon its annexation.[1567] He further rejected Brown's argument from necessity, noting that Hawaiian courts already possessed authority to impanel grand juries and to require unanimous jury verdicts.[1568]

Justice Harlan dissented separately, attacking as "a new doctrine" the suggestion that some constitutional provisions were more fundamental to U.S. governmental action than others.[1569] The Constitution had only been adopted, he noted, based on the promise that a Bill of Rights would be adopted to "prevent the infringement by any *Federal* tribunal or agency, of the rights then commonly regarded as embraced in Anglo-Saxon liberty."[1570] Harlan continued to maintain that the Constitution applied to Hawaii upon its annexation, "without any declaration to that effect by Congress, and without any power of Congress to prevent it,"[1571] and that the Fifth and Sixth Amendments accordingly deprived the United States of the power to criminally convict a defendant other than in the manner prescribed. The contrary view of the majority, he argued, "would place Congress above the

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1563. *Id.* at 217–18.

1564. *Id.* at 219–20 (White, J., concurring).

1565. Hurtado v. California, 110 U.S. 516 (1884); Bolln v. Nebraska, 176 U.S. 83 (1900); Maxwell v. Dow, 176 U.S. 581 (1900); *see also supra* note 1531.

1566. *Mankichi*, 190 U.S. at 223–25 (Fuller, C.J., dissenting).

1567. *Id.* at 226 (Fuller, C.J., dissenting).

1568. *Id.* at 223–24 (Fuller, C.J., dissenting).

1569. *Id.* at 244 (Harlan, J., dissenting).

1570. *Id.*

1571. *Id.* at 248 (Harlan, J., dissenting).

Constitution."[1572] Thus, he argued, the majority "assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction."[1573] The theory that the Constitution did not apply to Hawaii

> would mean that the will of Congress, not the Constitution, is the supreme law of the land only for certain peoples and territories under our jurisdiction .... Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a *colonial* system entirely foreign to the genius of our government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States, one, existing under a written Constitution ... the other, existing outside of the written Constitution, in virtue of an unwritten law, to be declared from time to time by Congress, which is itself only a creature of that instrument.[1574]

Harlan was equally unsympathetic to the majority's necessity argument, noting that "[i]f, after the passage of the joint resolution, the local authorities proceeded in the prosecution of crimes under municipal laws palpably contrary to the Constitution, the fault was theirs."[1575]

Much of the Court's concern regarding the application of the Constitution to the new territories was motivated by the problem of the Philippines, a concern which became express the following year. In *Dorr v. United States*,[1576] Justice White's incorporation theory was finally embraced by a majority of the Court in an opinion holding that the constitutional right to jury trial did not apply to the Philippines. Writing for the majority, Justice Day attempted to reconcile the various decisions regarding the applicability of the Constitution to the territories. The Court's decisions since the beginning of the republic, he argued, established that (1) "the Constitution of the United States is the only source of power authorizing action by any branch of the federal government";[1577] (2) the United States may acquire territory through the treaty-making and war powers, "and for that purpose has the powers of other sovereign nations";[1578] and (3) Congress may govern the territories "without being subject to all the restrictions which are imposed

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1572. *Id.* at 239 (Harlan, J., dissenting).
1573. *Id.* at 236 (Harlan, J., dissenting).
1574. *Id.* at 239–40 (Harlan, J., dissenting).
1575. *Id.* at 247 (Harlan, J., dissenting).
1576. Dorr v. United States, 195 U.S. 138 (1904).
1577. *Id.* at 140.
1578. *Id.*

upon that body when passing laws for the United States."[1579] Day concluded that the Framers, in adopting the Territory Clause, had recognized a power to hold territory which was not incorporated into the United States or covered by all constitutional provisions,[1580] and that the cases had "firmly established the power of the United States, like other sovereign nations, to acquire [additional territory] by the methods known to civilized people."[1581]

Applying these principles to the issue in *Dorr*, Day concluded that the Philippines were not incorporated and that the treaty with Spain "reserve[d] to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired territories."[1582] The President had instructed the Philippine Commission that the right to trial by jury would not apply in the Philippines, because, according to the Court, "the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right to trial by jury."[1583] As in *Mankichi*, the Court concluded that the Fifth and Sixth Amendment criminal protections did not apply to the Philippines and that the existing system adequately protected the fundamental rights of the accused.[1584] The contrary position—that "[i]f the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, . . . it must establish there the trial by jury"—was patently unworkable, according to Day.[1585] "To state such proposition demonstrates the impossibility of carrying it into practice."[1586]

Justice Harlan now dissented alone,[1587] arguing that the majority approach "is utterly revolting to my mind and can never receive my sanction."[1588] Harlan continued to argue that the constitutional protections of life, liberty, and property were "for the benefit of all, of whatever race or nativity" over which the U.S. government exercised its jurisdiction.[1589] The prohibition against criminal prosecution other than by grand and petit jury was an absolute mandate "addressed to every one committing a crime punishable by the United States."[1590] The concept that this prohibition could

1579. *Id.* at 142.
1580. *Id.* at 143.
1581. *Id.* at 146.
1582. *Id.* at 143.
1583. *Id.* at 145.
1584. *Id.* at 146.
1585. *Id.* at 148.
1586. *Id.*
1587. Justices Peckham, Fuller, and Brewer concurred only because the decision in *Hawaii v. Mankichi* that the grand and petit jury provisions of the Constitution were not fundamental was now binding precedent. They continued to reject White's incorporation theory from the *Downes* concurrence.
1588. *Dorr*, 195 U.S. at 156 (Harlan, J., dissenting).
1589. *Id.* at 154 (Harlan, J., dissenting).
1590. *Id.* at 155 (Harlan, J., dissenting).

be disregarded in the Philippines, when it could not be in the contiguous territories of the United States, "is . . . so obviously inconsistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction."[1591] Harlan concluded that the Court had rewritten the Constitution to read: "The trial of all crimes, . . . except where Filipinos are concerned, shall be by jury."[1592] The fact that provision of grand and petit juries might be inconvenient was "of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution."[1593]

In *Kepner v. United States*,[1594] decided the same day as *Dorr*, the Court finally enforced the prohibition against double jeopardy in the Philippines—not because the protection was constitutionally mandated, but because it had been extended there by Congress. In the 1902 statute establishing a temporary government in the Philippines, Congress had provided, *inter alia*, that "no person for the same offense shall be twice put in jeopardy of punishment."[1595] The United States nevertheless argued that the statute had simply continued the Spanish law tradition, which prohibited jeopardy only after all appeals (and retrials) were exhausted.[1596] The Supreme Court rejected this contention, finding that the 1902 Aet had applied much of the Bill of Rights to the Philippines, and declining to address whether the provision would apply absent the legislation.

Confirming that their apparent purpose was to make as few constitutional provisions applicable to the Philippines as possible, Justices Brown, White, McKenna, and Holmes dissented.[1597] Justice Brown embraced the government's argument, while Justice Holmes, who opened his dissent warning against the danger of criminals escaping justice, denied that the constitutional prohibition against double jeopardy barred someone who had been acquitted from being retried for the same offense.[1598]

In contrast to the decisions relating to Puerto Rico and the Philippines, the Court held in *Rassmussen v. United States*[1599] that the Sixth Amendment right to jury trial applied to Alaska, which had been incorporated into the United States. Writing for the majority, Justice White held that the treaty

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1591. *Id.*

1592. *Id.* at 156 (Harlan, J., dissenting).

1593. *Id.* at 155 (Harlan, J., dissenting).

1594. 195 U.S. 100 (1904).

1595. *Id.* at 117 (citing Military Order No. 58 (Apr. 23, 1900) § 5, at 3).

1596. *Id.* at 120.

1597. Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691, 707 (1998) (criticizing Justice Holmes's jurisprudenee for systematic failure to enforce constitutional rights).

1598. *Kepner*, 195 U.S. at 134 (Holmes, J., dissenting).

1599. 197 U.S. 516 (1905). The defendant had been convicted for operating a house of prostitution by a six-member jury, as provided by the Code of Alaska, which had been adopted for the territory by Congress.

with Russia, which provided that Alaska's inhabitants (with the exception of "uncivilized native tribes") "shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States,"[1600] had incorporated Alaska into the United States.[1601] The Court rejected the government's argument that Alaska was either an unincorporated or unorganized territory and that the Constitution therefore did not apply.[1602]

Justice Brown concurred on the ground that the treaty with Russia had affirmatively applied the Constitution to Alaska, and reaffirmed his position from *Downes* that "the Constitution does not apply to Territories acquired by treaty until Congress has so declared, and that in the meantime, under its power to regulate the territories, it may deal with them regardless of the Constitution, except so far as concerns the natural rights of their inhabitants to life, liberty and property."[1603] Although he had acquiesced in the analysis in *Dorr*, Brown now strenuously objected to the Court's reliance on the incorporation theory, arguing that the doctrine had not enjoyed a majority in *Downes*, had not been urged by the parties in their arguments or briefs, and had "never since that time received the endorsement of this court."[1604] Brown preferred an approach that allowed Congress to extend the Constitution to a territory clause by clause, as it saw fit.[1605] Brown argued that the decisions regarding the incorporation of Alaska and Hawaii were inherently inconsistent, and rendered the incorporation doctrine meaningless.

> When is a territory incorporated so as to make the Constitution applicable in all its provisions? . . . May Congress, in organizing or incorporating a territory, restrict the application of the Constitution to it, or must it give it all? What is an organized as distinguished from an incorporated territory? . . .
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> . . . .
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> Hitherto we have been content to divide our Territories into the organized and unorganized; but now we are asked to introduce a new classification of 'incorporated' Territories, without attempting to define what shall be deemed an incorporation.[1606]

Justice Harlan also rejected the incorporation argument and concurred on the grounds that the Constitution became fully applicable to Alaska immediately upon ratification of the treaty with Russia, "without any power in Congress to add to or impair or destroy that right."[1607]

1600. Treaty Concerning the Cession of the Russian Possessions in North America, June 20, 1867, U.S.-Russ., art. III, 15 Stat. 539, 452.

1601. *Rassmussen*, 197 U.S. at 522.

1602. *Id.* at 525.

1603. *Id.* at 531 (Brown, J., concurring).

1604. *Id.* at 532 (Brown, J., concurring).

1605. *Id.* at 536 (Brown, J., concurring).

1606. *Id.* at 533–35 (Brown, J., concurring).

1607. *Id.* at 531 (Harlan, J., concurring).

Like the alien cases, the *Insular* decisions ultimately reflected a compromise between the extreme position asserted by the government that the Constitution did not apply at all to the new possessions and the position that extraconstitutional governance was utterly inconsistent with American principles of enumerated powers and limited government. In the end, the Court ultimately aecepted the theory that the Constitution nominally applied, albeit in skeletal form, while deferring almost entirely to Congress regarding the citizenship status of the inhabitants and the constitutional protections that they would enjoy. Unlike the Indian and alien cases, there was no dispute regarding the public international law rule relating to state authority over ceded territories and peoples, and international practice provided substantial support for the Court's solution.

The result of the *Insular* decisions was to place the U.S. overseas territories into a uniquely ambiguous status similar to that held by the Indian tribes. Like the tribal members in the Indian cases, the inhabitants of the overseas possessions were neither citizens nor foreign nationals—they were subjects. Both the trust status of Indians and the "unincorporated" status of territories were created, defined, and terminated at the will of Congress. As in Indian cases, citizenship proved irrelevant in this context. The decisions stripping the territories of constitutional protection applied equally to U.S. citizens present in Puerto Rico and the Philippines as to the islands' local inhabitants. As in *In re Ross*, a U.S. citizen tried for capital crimes in the Insular territories was equally unprotected by the Fifth and Sixth Amendments. Ironically, citizens in Puerto Rico enjoyed fewer constitutional protections in the Insular territories than resident *aliens* in the United States, who, under *Yick Wo* and *Wong Wing*, were entitled to full constitutional protection of their persons and property.

The insignificance of eitizenship and the infinite malleability of the incorporation doctrine were underscored by the Court's 1922 decision in *Balzac v. Porto Rico*, which again raised the application of the Article III right to criminal jury trial to the island.[1608] In the 1917 Jones Act organizing the Puerto Rican government, Congress had granted U.S. citizenship to Puerto Rican residents and adopted a "Bill of Rights" for the island, which excluded the rights to grand and petit jury.[1609] Despite the facts that (1) Article III expressly applies beyond the states;[1610] (2) the right to jury trial already existed in Puerto Rico for felonies and, before the case was decided,

1608. *Balzac*, 258 U.S. 298; *accord* Porto Rico v. Tapia, 245 U.S. 639 (1918) (per curiam); Porto Rico v. Muratti, 245 U.S. 639 (1918) (per curiam).

1609. Organic (Jones) Act of Porto Rico of Mar. 2, 1917, 38 Stat. 951 (1918); *see also Balzac*, 258 U.S. at 305–08 (noting that the Jones Act's Bill of Rights included "substantially every one of the guarantees of the federal constitution" except those relating to a right to trial by jury).

1610. U.S. CONST. art. lll ("The trial of all crimes . . . shall be by jury; and . . . when not committed within any State, the trial shall be at such place or placcs as the Congress may by law havc dirccted.").

had been applied to all crimes by statute;[1611] and (3) the Court had found that less specific language incorporated Alaska in *Rassmussen*, the Court declined to infer incorporation.[1612] As in the Indian decision in *Sandoval*, the Court concluded that citizenship was "entirely consistent with non-incorporation" and limited constitutional protection.[1613] Implicitly arguing from territoriality, the Court reasoned, "It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it."[1614] The Court noted that Alaska had "involved none of the difficulties which incorporation of the Philippines and Porto Rico present[ed],"[1615] and that the fact that incorporation was a step toward statehood urged caution with respect to "distant ocean communities of a different origin and language" than America.[1616] Thus, as in the Indian cases, neither citizenship nor presence in territory subject to full U.S. sovereignty was sufficient for the Court to bestow full constitutional protections on this "subordinate" group.

The later *Insular Cases* ultimately rooted Congress's authority in both the Territory Clause and inherent powers, and thus did not rely solely on extraconstitutional sources of national authority. However, the powers that were attributed to the Territory Clause derived from theories of inherent sovereign powers and authority under international law. The Court's conclusions—that the status of the territories was largely a political question dedicated to Congress and that only fundamental constitutional protections applied—along with its failure to identify any protections deemed "fundamental," left the governance of U.S. overseas territories largely in an extraconstitutional zone whose boundaries were governed by inherent sovereign powers.

The treatment of U.S. territories in the *Insular Cases* also contrasted sharply with the Supreme Court's approach to territorial conflicts between Congress and the states. In a 1907 dispute between Kansas and Colorado regarding Colorado's diversion of non-navigable waters,[1617] the United States sought to intervene, citing the government's alleged duty to legislate nationally "for the reclamation of arid lands," including large tracts of federal territory.[1618] The government based its authority on the Territory Clause and "the doctrine of sovereign and inherent powers," arguing that "[a]ll

1611. *Balzac*, 258 U.S. at 302–03.
1612. *Id.* at 309.
1613. *Id.* at 308.
1614. *Id.* at 309.
1615. *Id.*
1616. *Id.* at 311.
1617. Kansas v. Colorado, 206 U.S. 46 (1907).
1618. *Id.* at 86.

legislative power must be vested in . . . the National Government."[1619] The Court unanimously dismissed this contention, finding that none of the enumerated powers of Congress "by any implication [refers] to the reclamation of arid lands,"[1620] and that "the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers."[1621] Writing for the Court, Justice Brewer noted that the contention that all powers not held by the States must rest in the national legislature ignored the Constitution's express reservation of all non-enumerated powers to the people. "Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted."[1622] Brewer acknowledged that the Framers had not anticipated the need for arid land reclamation, but that, "as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But, if no such power has been granted, none can be exercised."[1623] Congress's power to legislate regarding arid lands, the Court found, was limited to the territories, where "Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution."[1624] "No independent and unmentioned power" passes to the national government.[1625]

H. The Modern Territorial Doctrine

As in the Indian and alien contexts, the doctrines established during the inherent powers era have continued to govern U.S. authority over territorial possessions. Of the territories acquired between 1898 and 1900, only Hawaii, which began petitioning for statehood in 1903,[1626] was ultimately granted statehood in 1959. None of the Insular territories have ever been incorporated into the United States. Puerto Ricans were allowed to adopt a constitution, form their own government, and were given commonwealth status between 1950 and 1952, although their constitution remained subject to amendment by Congress. Residents of the Philippines were restricted by quotas from traveling to the United States in 1934,[1627] and the Philippines

1619. *Id.* at 89.
1620. *Id.* at 88.
1621. *Id.* at 89.
1622. *Id.* at 90.
1623. *Id.* at 91–92.
1624. *Id.* at 92.
1625. *Id.* at 88.
1626. *See* LEIBOWITZ, *supra* note 1149, at 76.
1627. *See id.* at 28.

were granted independence in 1946. The inhabitants of American Samoa still have not been granted citizenship, but remain U.S. "nationals,"[1628] though at least the political elites of Samoa appear to prefer their non-citizen, unincorporated territorial status.

The Supreme Court remains reluctant to constrain congressional power in the territories. The Court, for example, has recognized broad authority for Congress to discriminate against territorial citizens in bestowing government benefits. In *Califano v. Torres*[1629] and *Harris v. Rosario*,[1630] the Court summarily upheld the authority of Congress to deny disability and welfare benefits to Puerto Ricans against right-to-travel and equal protection challenges. The Court expressly relied on the Territory Clause to hold that "Congress . . . may treat Puerto Rico differently from States so long as there is a rational basis for its actions."[1631] Although the Court presumed that the relevant constitutional provisions applied in both cases, the Court accepted the federal justification for the discrimination without analysis in brief per curiam opinions.[1632] Thus, the Court has essentially applied a rational basis standard to federal actions in the territories that are alleged to violate fundamental individual rights.[1633]

Courts also have expanded plenary power over territories to recognize a broad *executive* authority over the territories, generally stemming from the strategic function of U.S. overseas possessions and the Commander in Chief power.[1634] Guam and Samoa, for example, were governed exclusively by the U.S. Navy until Congress finally legislated for them following World War

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1628. ALEINIKOFF, *supra* note 50, at 75.

1629. 435 U.S. 1 (1978) (rejecting a right-to-travel challenge to discrimination in SSI benefits).

1630. 446 U.S. 651 (1980) (rejecting an equal protection challenge to discrimination in Social Security benefits).

1631. *Id.* at 651–52; *accord* Califano v. Torres, 435 U.S. 1, 3 n.4 (1978) ("Congress has the power to treat Puerto Rico differently, and . . . every federal program does not have to be extended to it.").

1632. The Court simply recited the government's justifications in a footnote. *Califano*, 435 U.S. at 5 n.7.

1633. *Harris*, 446 U.S. at 654 (Marshall, J., dissenting) ("Heightened scrutiny under the equal protection component of the Fifth Amendment, the Court concludes, is simply unavailable to protect Puerto Rico or the citizens who reside there from discriminatory legislation, as long as Congress acts pursuant to the Territory Clause."). *But see* Case Comment, *The Right To Travel—Residence Requirements and Former Residents:* Fisher v. Reiser, 93 HARV. L. REV. 1585, 1587 n.26 (1980) (suggesting that *Califano* stands for the more modest proposition that "[c]ourts traditionally have accorded a rebuttable presumption of constitutionality to statutes providing for the allocation of monetary benefits").

1634. *See* United States v. Angcog, 190 F. Supp. 696, 699 (D. Guam 1961) ("The President is the Commander in Chief of the United States Armed Forces . . . and it was in this capacity that [he] possessed his authority to govern Guam."). *Cf.* Feliciano v. United States, 297 F. Supp. 1356 (D.P.R. 1969), *aff'd per curiam*, 422 F.2d 943 (1st Cir. 1970). *See also* D. Michael Green, *America's Strategic Trusteeship Dilemma: Its Humanitarian Obligations*, 9 TEX. INT'L L.J. 19 (1974); Note, *Executive Authority Concerning the Future Political Status of the Trust Territory of the Pacific Islands*, 66 MICH. L. REV. 1277 (1968).

II.[1635] Even then, courts upheld the authority of the President to bar travel by U.S. citizens and territorial inhabitants to areas within these islands designated as militarily sensitive.[1636] As in the alien context, national self-preservation and security concerns have contributed to the plenary power doctrine's endurance.

Some inroads on the doctrine have been made, however. Although the concept of inherent powers played an important role in the construction of the *Insular* doctrine, the rhetoric of inherent powers has largely disappeared from judicial analysis, and modern courts have assumed that the authority derives from the Constitution.[1637] Moreover, in the latter half of the twentieth century, federal courts gradually expanded the range of constitutional protections that applied to the territories. Despite the textual limitation of the Republican Guarantee Clause to states, the Supremc Court has held that local voting rights are fundamental rights that apply to the territories,[1638] and has suggested, without deciding, that the right to travel[1639] and habeas corpus[1640] also apply. Because many constitutional provisions have been extended to the territories by statute, however, it is often difficult to determine the extent to which the courts view the extension as constitutionally mandated. In 1989, for example, the Court invalidated a Virgin Islands residency requirement for bar membership based on Congress's affirmative extension

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1635. *See* 25 Op. Att'y Gen. 292 (1904) ("The political status of . . . [Guam] is anamolous. Neither the Constitution nor the laws of the United States have been extended to . . . [it], and the only administrative authority existing in . . . [it] is that derived . . . from the President as Commander in Chief . . . ."), *cited in Angcog*, 190 F. Supp. at 699. Congress finally exercised its territorial authority over Guam in 1950. Organic Act of Guam, 64 Stat. 384 (1950).

1636. *See* LEIBOWITZ, *supra* note 1149, at 16. Between 1950 and 1962, the United States prohibited travel by U.S. citizens to Guam and parts of Puerto Rico and American Samoa on national security grounds. The restrictions reportedly were lifted when Governor John Connally of Texas was barred from traveling to Guam in 1962 and personally called President Kennedy to complain. *Id.* at 16 n.46.

1637. *E.g.*, *Harris*, 446 U.S. at 651 (deriving congressional power from the Territory Clause); Ralpho v. Bell, 569 F.2d 607, 618 (D.C. Cir. 1977) (same). For further discussion of post-Insular developments and modern constitutional implications of the doctrine, see Sanford Levinson, *Why the Canon Should be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000); Neuman, *supra* note 54, at 182; Aleinikoff, *supra* note 54; LEIBOWITZ, *supra* note 1149, at 26–27; David M. Helfeld, *How Much of the Federal Constitution is Likely to be Held Applicable to Puerto Rico?*, 39 REV. JUR. U.P.R. 169 (1970).

1638. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (holding that "the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States").

1639. Califano v. Torres, 435 U.S. at 4 n.6 (1977) ("For purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union.").

1640. Johnson v. Eisentrager, 339 U.S. 763 (1950) (suggesting that non-enemy aliens held on U.S. territory may be entitled to habeas protection). *But see* Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002) (appeal pending) (holding that *Eisentrager* bars aliens held outside sovereign U.S. territory from seeking habeas corpus).

of the Article IV Privileges and Immunities Clause to the territory.[1641] The Court did not address whether the clause was sufficiently fundamental (or whether the territory was sufficiently analogous to a "State") to apply absent that congressional action.[1642] The Court has recognized since *Balzac* that the First Amendment applies to Puerto Rico, but because the 1917 Organic Act extended First Amendment free speech protections to the territory, the Court has never addressed the Amendment's independent application.[1643] In *Torres v. Puerto Rico*, the Court likewise held that Fourth Amendment protections against unreasonable searches and seizures applied to Puerto Rico, without indicating whether it was relying on congressional extension of the clause or constitutional mandate.[1644]

The Supreme Court has repeatedly held that principles of due process and equal protection apply to Puerto Rico, though it has declined to root the protection in any specific constitutional provision. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Supreme Court suggested that these principles applied as a matter of fundamental law, asserting that "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States."[1645] In *Examining Board of Engineers v. Flores de Otero*, the Supreme Court struck down a Puerto Rican statute restricting civil engineering licenses to citizens as violating equal protection and due process.[1646] Without deciding whether the constitutional prohibition derived from the Fifth or Fourteenth Amendments, the Court applied strict scrutiny principles that the Court has employed for state laws discriminating on the basis of alienage.[1647] The Court's unwillingness to identify the source

1641. Barnard v. Thorstenn, 489 U.S. 546, 559 (1989).

1642. *Id.* (discussing U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.")).

1643. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 331 n.1 (1986) (citing Balzac v. Porto Rico, 258 U.S. 298, 314 (1922)) (upholding territorial statute against commercial speech challenge). *See also* El Vocero de P.R. v. Puerto Rico, 508 U.S. 147 (1993) (per curiam) (freedom of press).

1644. Torres v. Puerto Rico, 442 U.S. 465, 470–71 (1979). The Court noted that Congress had applied Fourth Amendment rights to Puerto Rico by statute since 1917, that the protection was preserved in Puerto Rico's constitution, and that application of the clause to Puerto Rico would not involve "danger to national interests or risk of unfairness." *Id.* at 470. The Court then suggested that the constitutional provision applied *ex proprio vigore*, noting that "[a]s in [*Flores*], we have no occasion to determine whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment." *Id.* at 471 (citation omitted).

1645. *Calero-Toledo*, 416 U.S. at 669 n.5 (quoting Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953)).

1646. Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976).

1647. *Id.* at 601–02. *Cf.* Ralpho v. Bell, 569 F.2d 607, 618–19 (D.C. Cir. 1977) (holding that the Fifth Amendment applies to Micronesia regardless of its status as a trust territory, because "it is settled that 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law'").

of the constitutional protection, however, raised a number of cognitive difficulties. Applying equal protection to the territory through the Fourteenth Amendment would have required a finding that the Commonwealth of Puerto Rico was the equivalent of a "State" for purposes of that Amendment. On the other hand, concluding that the Fifth Amendment Due Process Clause applied to Puerto Rico would require viewing that government as the continuing instrument of Congress, thus undermining Puerto Rican sovereignty. This approach might also suggest that the Court should have applied, not the strict standard of scrutiny applicable to *state* discrimination against aliens, but the more lenient rational basis scrutiny applied to congressional measures, in deference to Congress's plenary authority over aliens.[1648]

The lower courts have found a number of additional provisions applicable to the territories, including the Eighth Amendment protection against cruel and unusual punishment[1649] and the Eleventh Amendment.[1650] The Fifth Amendment double jeopardy provisions have been applied to actions by both the federal and local governments in the territories,[1651] though the lower courts have divided over whether territorial governments constitute separate sovereigns for purposes of the Double Jeopardy Clause.[1652] Despite the fact that the Supreme Court held in 1968 that the right to jury trial for serious criminal offenses applied to the states through the Fourteenth Amendment,[1653] the lower courts are divided regarding whether the right to criminal jury trial similarly applies to the territories.[1654]

1648. It might be possible, however, to argue under *Hampton v. Mow Sun Wong* that even under the Fifth Amendment, local Puerto Rican legislation is not entitled to the more lenient rational basis test. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding that the federal government must assert an overriding national interest, and requiring a legitimate basis for presuming that a rule was actually intended to serve that interest, in order to justify a rule barring aliens from federal employment that would not be acceptable if adopted by a state).

1649. Feliciano v. Barcelo, 497 F. Supp. 14, 33 (D.P.R. 1979).

1650. Fernandez v. Chardon, 681 F.2d 42, 59 n.13 (1st Cir. 1982) ("The Commonwealth enjoys the full benefits of the eleventh amendment."). The Eleventh Amendment's application appears to derive from the assumption that Puerto Rico enjoys a sovereign's common law authority to avoid suit. *See* Salkin v. Puerto Rico, 408 F.2d 682 (1st Cir. 1969).

1651. Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937).

1652. *Compare* United States v. Sanchez, 992 F.2d 1143, 1152 (11th Cir. 1993) (holding that "[t]he authority with which Puerto Rico brings charges as a prosecuting entity derives from the United States as sovereign," and double jeopardy bars a second prosecution), *with* United States v. Andino, 831 F.2d 1164, 1167–68 (1st Cir. 1987) (holding that Puerto Rico is a separate sovereign, and double jeopardy does not bar prosecution).

1653. Duncan v. Louisiana, 391 U.S. 145 (1968).

1654. *Compare* Torres v. Delgado, 391 F. Supp. 379, 383 (D.P.R. 1974) (holding that the right to jury trial is fundamental and applicable to Puerto Rico), *with* King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977) (holding that the right to criminal jury trial applies to American Samoa because it is not "impractical and anomalous"), *and* Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 689–90 (9th Cir. 1984) (holding that the right to jury trial is fundamental to the "Anglo-American regime of ordered liberty," but not fundamental to free government in the international sense, and thus not applicable to territories) (quoting *Duncan*, 391 U.S. at 149–50 n.14).

Where constitutional provisions do apply, the courts often have restricted the scope of the rights protected, either by concluding that the particular protection is not available, or by applying a deferential standard of review. In recent years, these decisions have been based, in part, on a desire to accommodate cultural differences and self-determination among the territorial inhabitants. In the spring of 2000, for example, the Supreme Court summarily affirmed a decision that the "one-person, one-vote" requirements of the Equal Protection Clause did not apply to the U.S. citizens of the unincorporated Northern Mariana Islands. The court found that, while equal protection generally applied to the territory, the specific equal protection right at issue was not one of "those fundamental limitations in favor of personal rights" which are "the basis of all free government."[1655] Lower courts have applied a similar analysis to uphold the decision of the Northern Mariana government not to afford a right to jury trial[1656] and to conclude that even if the right to criminal jury trial applies, it does not include a right to unanimous verdicts.[1657] In *Wabol v. Villacrusis*,[1658] the Ninth Circuit likewise held that while the Equal Protection Clause applied to the territories, it would be impractical and anomalous to apply equal protection to invalidate a race-based restriction on land sales that was intended to protect traditional island culture. The court therefore concluded that equal protection analysis did not apply in this context.[1659] And *Banks v. American Samoa Government* upheld a race-based employment preference for American Samoans, finding, under the *Insular Cases*, that the relevant equal protection principles were not fundamental to all free and civilized societies and thus not applicable in American Samoa, "at least when they would tend to be destructive of the traditional culture."[1660] Finally, like the benefits decisions in *Califano* and *Harris*, lower courts have held that race-based classifications satisfied traditional strict scrutiny analysis, albeit without scrutinizing the alleged compelling interest or requiring that measures be narrowly tailored.[1661]

1655. Torres v. Sablan, 528 U.S. 110 (2000), *aff'g* Rayphand v. Sablan, 95 F. Supp. 2d 1133 (D. N. Mar. I. 1999) (quoting Dorr v. United States, 195 U.S. 138, 146–47 (1904)).

1656. *Atalig*, 723 F.2d at 689–90.

1657. *Delgado*, 391 F. Supp. at 383 ("The requirement of unanimity is not fundamental to the right of trial by jury and, as such, is not applicable to the jury trials in the courts of the Commonwealth of Puerto Rico.").

1658. Wabol v. Villacrusis, 958 F.2d 1450, 1461 n.19 (9th Cir. 1992) ("It is the specific right of equality that must be considered for purposes of territorial protection, rather than the broad general guarantee of equal protection.").

1659. *Id.* at 1460–61 (rejecting an equal protection challenge to land alienation as not implicating a fundamental right in the international sense).

1660. Banks v. American Samoa Gov't, 4 Am. Samoa 2d 113, 125 (1987).

1661. *See* Craddick v. Territorial Registrar of Am. Sam., 1 Am. Samoa 2d 10, 14 (1980) (applying strict scrutiny to uphold restrictions on the sale of privately held land to non-Samoans, finding, without requiring evidentiary support, that a compelling state interest in preserving island lands and culture justified the measure); *see also* Examining Bd. of Eng'rs v. Flores de Otero, 426

Thus, as in the Indian and alien contexts, courts have tolerated overt race-based discrimination by territories under federal authority that would not be tolerated if enacted by states.[1662] And, as in the Indian cases, the lack of full constitutional application to the territories has had some benefits. Territories, like Indian tribes, are excluded from federal tax laws, though the constitutionality of these measures in the territories has not been considered. Territorial laws discriminating in favor of territorial inhabitants on the basis of race or ethnicity have been upheld under highly deferential equal protection analysis, with the result that territorial residents and Native Americans may become the only groups in America who may lawfully continue to carry out and benefit from affirmative action programs.[1663]

While some additional constitutional protections have been recognized in the territories, the basic holding of the *Insular Cases* that only fundamental rights apply has endured. In the 1950 case of *Johnson v. Eisentrager*, the Supreme Court combined alienage and territoriality principles to hold that aliens who actively assisted the enemy during wartime and were tried and detained by the U.S. military outside of sovereign U.S. territory were not entitled to habeas review regarding the legality of their sentences.[1664] Both the majority and dissenters cited *Downes* in support of their positions.[1665] In 1957, the Supreme Court held in *Reid v. Covert* that the right to jury trial applied to the capital trial of U.S. civilians on military bases abroad.[1666] A four-member plurality of the Court narrowly cabined the *Insular Cases*[1667]

U.S. 572, 605–06 (1976) (invalidating discrimination based on alienage under traditional strict scrutiny analysis).

1662. *Cf.* Rice v. Cayetano, 528 U.S. 495, 524 (2000) (striking down state voting preference for persons of Hawaiian ancestry).

1663. *See, e.g.*, *Banks*, 4 Am. Samoa 2d at 124 n.4 (noting that "in the absence of [the *Insular Cases*], the constitutionality of the Samoan preference as an affirmative action plan would be problematic"); Morton v. Mancari, 417 U.S. 535, 555 (1974) (upholding the constitutionality of an "Indian preference" statute for employment in the Bureau of Indian Affairs). The differential treatment of both Indians and territorial inhabitants is justified on the grounds of their semi-sovereign status and the United States' trust obligation towards them.

1664. Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) (Jackson, J.) ("[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."). The decision, as Justice Black criticized in dissent, allowed the executive branch to decide whether constitutional protections and judicial review of its actions would be available merely "by deciding where its prisoners will be tried and imprisoned." *Id.* at 795 (Black, J., dissenting). *But see In re* Yamashita, 327 U.S. 1, 9 (1945) (holding that the executive branch may not, short of a suspension of the writ of habeas, deny the Court power to examine the authority of a military commission to try an enemy alien overseas).

1665. *See Eisentrager*, 339 U.S. at 784–85 (Jackson, J.); *id.* at 797 (Black, J., dissenting). This decision remains in force and is the government's primary precedent for the legal status of the enemy aliens currently detained on Guantanamo.

1666. Reid v. Covert, 354 U.S. 1 (1957).

1667. *Id.* at 14 (Black, J., plurality opinion) ("It is our judgment that neither the [Insular] cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become

and rejected *In re Ross* as "a relic from a different era."[1668] Justices Frankfurter and Harlan, in concurrence, sought to distinguish and narrow the holdings in *In re Ross* and the *Insular Cases*[1669] but did not entirely deny their continued vitality. Frankfurter aecordingly argued that the application of constitutional provisions abroad was to be decided on a case-by-case basis,[1670] and Harlan argued that constitutional rights applied to U.S. actions abroad when they were not "impractical and anomalous."[1671] In 1979, a four-member plurality in *Torres* followed *Reid* to conclude that given "the particular historical context in which they were decided," the *Insular Cases* were "not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico . . . ."[1672] Nevertheless, the imperial era cases have retained vitality, and, when read in combination with *Reid*, have simply modified the analysis of the Constitution's application from whether a particular provision is "fundamental" to free government to a case-by-case analysis regarding whether the application of the right would be "impractical and anomalous" in any particular country.

The resulting tension in analysis was evident in *United States v. Verdugo-Urquidez*, in which the Court followed the *Insular Cases*, *In re Ross*, and the *Reid* plurality to conclude that the Fourth Amendment did not apply to the seizure of a nonresident alien's property abroad.[1673] Writing for a bare majority, Chief Justice Rehnquist argued, in a social contract analysis reminiscent of Chief Justice Taney, that the Fourth Amendment's reference to "the people" excluded aliens lacking substantial contacts with the United States.[1674] Justice Kennedy's concurrence, which provided the critical fifth

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inconvenient or when expediency dictatcs otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution.").

1668. *Id.* at 12 (Black, J., plurality opinion). The holding in *Reid* was extended to non-capital cases in *Kinsela v. United States ex rel. Singleton*, 361 U.S. 234 (1960), and *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

1669. *See, e.g.*, *Reid*, 354 U.S. at 56 (Frankfurter, J., concurring) ("Insofar as [*In re Ross*] expressed a view that the Constitution is not operative outside the United States . . . it expressed a notion that has long since evaporated."); *id.* at 67 (Harlan, J., concurring) (asserting that "we were mistaken [last term] in interpreting *In re Ross* and the *Insular Cases* as standing for the sweeping proposition that the safeguards of Article III and the Fifth and Sixth Amendments automatically have no application to the trial of American citizens outside the United States, no matter what the circumstanccs").

1670. *Id.* at 54 (Frankfurter, J., concurring) ("This Court considered the particular situation in each newly acquired territory to determine whether the grant to Congress of power to govern 'Territory' was restricted by a specific provision of the Constitution.").

1671. *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

1672. Torres v. Puerto Rico, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring in the judgment).

1673. United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990). *See id.* at 277 (Kennedy, J., concurring) (relying on the *Reid* plurality and noting that the Court has not invalidated the *Insular Cases* or *In re Ross*).

1674. *Id.* at 270–71.

vote, distanced itself from this analysis and instead concluded that applying the warrant requirement to aliens abroad would be "impractical and anomalous."[1675] Although Chief Justice Rehnquist stated in dicta that the Court has emphatically rejected any extraterritorial application of the Fifth Amendment,[1676] a majority of the Court, including Justice Kennedy, did not embrace that analysis.

The United States continues to assert in litigation that aliens outside the United States enjoy no constitutional protection. Thus, in *Haitian Centers Council v. McNary*,[1677] the United States maintained that Haitian political asylum applicants being indefinitely detained on the U.S. naval base in Guantanamo Bay, Cuba, were not entitled to due process protection,[1678] and in *Miller v. Albright*, the United States contended that an alien outside the United States seeking to challenge a naturalization statute had no substantive rights under the Fifth Amendment.[1679] More recently, in *Rasul v. Bush*, the United States has contended that even friendly aliens detained outside the United States have no protection under the Fifth Amendment and no access to habeas corpus.[1680]

Despite the confusion in the doctrine, however, lower federal as well as state courts have held that the Fourth Amendment applies to searches of aliens with some voluntary attachments to the United States[1681] and U.S. citizens abroad,[1682] and that the Fifth Amendment Takings[1683] and Due

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1675. *Id.* at 278 (Kennedy, J., concurring). *See also id.* at 276 ("The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend . . . on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.'").

1676. *Id.* at 269 (citing Johnson v. Eisenstrager, 339 U.S. 763, 770 (1950); Downes v. Bidwell, 182 U.S. 244, 284 (1901)).

1677. Haitian Ctrs. Council v. McNary, 969 F.2d 1326 (2d Cir. 1992).

1678. The refugee plaintiffs claimed that they had a Fifth Amendment right not to be forcibly returned to Haiti without due process in the asylum proceedings being conducted on Guantanamo. The United States attempted to portray the cause as one involving a right to enter the United States, and contended that aliens had no constitutional rights in their request for admission. *See* Brief for Appellants at 29–33, *McNary* (No. 92-6090).

1679. *See* Brief for the United States at 11–12, Miller v. Albright, 523 U.S. 420 (1998) (No. 96-1060) (positing that "such an alien has no substantive rights cognizable under the Fifth Amendment").

1680. *See* Respondent's Motion to Dismiss Petitioner's First Amended Petition for Writ of Habeas Corpus at 20–21 & n.9, Rasul v. Bush, No. CV: 02-0299 (CKK) (D.D.C. 2002) (arguing that the decision in *Johnson v. Eisenstrager* applies to all aliens abroad, and urging that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens" (quoting United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 318 (1936))).

1681. Riechmann v. State, 581 So. 2d 133, 138 (Fla. 1991).

1682. United States v. Bin Laden, 126 F. Supp. 2d 264, 270–71 (S.D.N.Y. 2000) (finding that no warrant is required for foreign intelligence collection).

1683. Ramirez v. Weinberger, 788 F.2d 762 (D.C. Cir. 1986) (en banc) (reviewing U.S. confiscation of an American citizen's property in Honduras for a military base); Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953) (addressing the U.S. confiscation of military goods in

Process Clauses[1684] constrain some U.S. actions overseas. On the other hand, two federal district courts recently affirmed the *Johnson v. Eisentrager* holding, finding that alleged Al Qaeda and Taliban members deemed "enemy combatants" by the executive, who had no contacts with the United States and were held indefinitely on Guantanamo Naval Base, were not entitled to habeas corpus.[1685]

The evolution of territorial status also has altered the constitutional analysis to some degree. Although none of the Insular possessions have been "incorporated" and placed on the road to statehood, several U.S. possessions (most notably Puerto Rico and the Northern Marianas) have been granted self-government and commonwealth status by mutual consent. This devolution of power to the territorial governments has led some courts to conclude that constitutional rights apply, not because they are fundamental, but because the territories are the functional equivalents of states. The Supreme Court has concluded that "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union,"[1686] and courts have suggested that Puerto Rico may enjoy the status of a "state" for purposes of the Fifth,[1687] Eleventh,[1688] and Fourteenth Amendments.[1689] The Supreme Court also has held that the Puerto Rican Commonwealth is sufficiently sovereign to be considered a state for purposes of certain federal

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the recently independent Philippines). The *Turney* court distinguished *In re Ross* on the grounds that the Takings Clause could be applied "without inconvenience or practical difficulty." *Id.* at 464.

1684. Haitian Ctrs. Council v. McNary, 969 F.2d 1326 (2d Cir. 1992) (stating that Haitian refugees detained at Guantanamo Bay Naval Base raised a serious question regarding entitlement to due process protection), *vacated as moot*, 509 U.S. 918 (1993); Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1041–42 (E.D.N.Y. 1993) (finding that Haitians detained on Guantanamo Bay Naval Base were entitled to due process protection), *vacated by Stipulated Order Approving Class Action Settlement Agreement* (Feb. 22, 1994). *See also* Wang v. Reno, 81 F.3d 808, 817–18 (9th Cir. 1996) (finding that an alien paroled into the United States was protected by due process). *But see* Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1427 (11th Cir. 1995) (finding that Cubans and Haitians provided safe haven at Guantanamo lacked a liberty or property interest to trigger due process); Harbury v. Deutsch, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom.* Christopher v. Harbury, 122 S.Ct. 2179 (2002) (concluding that *Verdugo*'s dicta was binding and precluded extraterritorial application of the Fifth Amendment).

1685. Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002) (appeal pending); Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002). Remarkably, the court in *Rasul* concluded that *Johnson v. Eisentrager* applied not only to enemy combatants, but to all "aliens outside territory over which the United States was sovereign." *Rasul*, 215 F. Supp. 2d at 67.

1686. Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 594 (1976) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 671 (1974)).

1687. *See Lopez Andino*, 831 F.2d at 1168 ("Puerto Rico is to be treated as a state for purposes of the double jeopardy clause.").

1688. *See, e.g.*, Fernandez v. Chardon, 681 F.2d 42, 59 n.13 (1st Cir. 1982) (noting that the Eleventh Amendment applies to Puerto Rico).

1689. *Flores de Otero*, 426 U.S. at 594; *Calero-Toledo*, 416 U.S. at 671. *See also* Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953) (finding that Puerto Ricans are entitled to due process protection under the Commonwealth Agreement).

jurisdictional statutes.[1690] The analogy to statehood is not complete, however. Territorial residents remain unable to elect voting members of Congress or participate in the Electoral College because the applicable constitutional provisions are textually limited to the "States."[1691] Territorial residents also apparently are not entitled to citizenship under the Fourteenth Amendment's provision for persons "born in the United States."[1692]

Furthermore, a serious question remains whether territorial sovereignty has "vested," as state sovereignty does when granted, or whether the legal status of the territories remains subject to repeal by Congress. Some courts have suggested that Congress's devolution of power to the territories is irreversible,[1693] while others have observed that "Congress may unilaterally repeal the Puerto Rican Constitution . . . and replace [it] with any rules or regulations of its choice."[1694] As the *Sanchez* court put it:

> Congress has simply delegated more authority to Puerto Rico over local matters. But this has not changed in any way Puerto Rico's constitutional status as a territory, or the source of power over Puerto Rico. Congress continues to be the ultimate source of power pursuant to the Territory Clause of the Constitution.[1695]

The Court distingnished territorial residents from inhabitants of later admitted states, which although originally created by—and subject to—the territorial authority of Congress, became permanent separate sovereigns, protected by the Tenth Amendment, upon their formal admission to the Union.[1696] The Supreme Court also has distinguished the sovereignty held by

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1690. *See Flores de Otero*, 426 U.S. at 597 (federal civil rights jurisdiction); *Calero-Toledo*, 416 U.S. at 670–76 (Three-Judge Court Act). *But see* Fornaris v. Ridge Tool Co., 400 U.S. 41, 42 n.1 (1970) (noting that a Puerto Rican statute is not a state statute within the meaning of 28 U.S.C. § 1254(2), which permits Supreme Court review of Court of Appeals decisions holding state statutes unconstitutional).

1691. *See* Iguarta De La Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (per curiam) (noting that only a constitutional amendment or grant of statehood could provide Puerto Rican residents such voting rights).

1692. Valmonte v. INS, 136 F.3d 914, 918 (2d Cir. 1998) (holding that the *Insular Cases* establish that persons born in the Philippines while it was a U.S. territory were not born within the "United States" within the meaning of the Fourteenth Amendment).

1693. *See* United States *ex rel.* Richards v. Guerrero, 4 F.3d 749 (9th Cir. 1993) (finding that the Northern Marianas covenant is legally binding on Congress); United States v. Andino, 831 F.2d 1164, 1168 (1st Cir. 1987) ("Puerto Rico, like a state, is an autonomous political entity.") (internal citation omitted); United States v. Quinones, 758 F.2d 40, 42 (1st Cir. 1985) (noting that authority in Puerto Rico flows from a compact which Congress cannot unilaterally amend).

1694. United States v. Sanchez, 992 F.2d 1143, 1152–53 (11th Cir. 1993) (finding that Puerto Rico remains subject to ultimate U.S. sovereignty). *See also* Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) ("Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty.").

1695. *Sanchez*, 992 F.2d at 1152 (quoting *Andino*, 831 F.2d at 1176 (Torruella, J., concurring)).

1696. *Id.* at 1149 n.4.

territorial governments from that enjoyed by Indian tribes,[1697] reasoning that while Indian tribes, like territorial governments, retain limited sovereignty "only at the sufferance of Congress and . . . subject to complete defeasance,"[1698] Indian sovereignty did not *originate* from Congress, as does territorial sovereignty, but derived from a separate source of inherent authority.[1699] If territories indeed remain subject to ultimate congressional power, this potentially would mean that Congress could rescind their constitutions and withdraw all but the most fundamental constitutional protections at will. And if territorial citizenship exists only at the behest of Congress, then territorial inhabitants, like Indians, potentially remain vulnerable to certain forms of expatriation.[1700]

VI. Inherent Powers and Constitutional Faith

In the period between 1886 and 1903, the Supreme Court embraced an inherent powers theory to uphold broad federal authority in a series of cases over Indians, aliens, and territories. The decisions in *Kagama* (1886), *Chae Chan Ping* (1889), *Church of Latter-Day Saints* (1890), *Jones* (1890), *In re Ross* (1891), *Nishimura Ekiu* (1892), *Fong Yue Ting* (1893), *Stephens* (1899), *Cherokee Nation* (1902), *Lone Wolf* (1903), the *Insular Cases* (1901–1905), and others all invoked inherent authority that derived from international law concepts of sovereignty and that was only tangentially connected to the constitutional text. Both the decisions and the political actions which they upheld reflected an approach to national sovereignty radically different from the concepts of enumerated powers and limited government, with powers reserved to the states and the people, that inspired the Constitution. Within the boundaries of the organized states, and with respect to full-fledged citizens, constitutional constraints of federalism, separation of powers, and individual rights were fully operative. Yet, in its external affairs and relations with non-members, the cases viewed the United States as a complete sovereign in the international law sense. The result was a bifurcated Constitution which had little more to say about U.S. actions expelling aliens, or governing Indians and non-Anglo-Saxon peoples abroad, than it said about the actions of any country in Europe. In the most extreme

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1697. United States v. Wheeler, 435 U.S. 313 (1978) (holding that double jeopardy does not bar retrial between the United States and Indian tribes, because tribes are separate sovereigns within their jurisdiction); *cf.* Talton v. Mayes, 163 U.S. 376 (1896) (holding that constitutional provisions do not apply to actions of Indian tribes, which enjoy original sovereignty not derived from Congress).

1698. *Wheeler*, 435 U.S. at 323.

1699. *See id.* at 328 ("None of these laws *created* the Indians' power to govern themselves . . . .").

1700. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253 (1967); Rogers v. Bellei, 401 U.S. 815 (1971); Vance v. Terrazas, 440 U.S. 910 (1980). *See also* LEIBOWITZ, *supra* note 1149, at 28 & n.112; *supra* note 540.

late-nineteenth-century vision, these governmental actions were entirely extraconstitutional, with the only constraints coming from international law.

The degree of disconnect between the Court's domestic and external constitutional analysis is startling. During the 1890s and 1900s, the Court's domestic jurisprudence focused on enforcing a formalistic vision of the federal government and strictly applied concepts of federalism and separation of powers to constrain national authority. The powers of both the states and the national government were viewed as limited, either in relation to each other or in their relation to the body politic. In the areas of antitrust, interstate commerce, and labor regulation, to name a few, the Court engaged in a searching exploration of the limits of governmental power. Thus, in *United States v. E.C. Knight*,[1701] *Pollock v. Farmers' Loan & Trust Co.*,[1702] and *Adair v. United States*,[1703] the Court invalidated federal efforts to regulate monopolistic behavior, the federal income tax, and labor rights legislation as exceeding the federal commerce authority.[1704] "Commerce," Chief Justice Fuller famously pronounced in *E.C. Knight*, "succeeds to manufacture, and is not a part of it."[1705] Domestically, the Court repeatedly rejected the contention that the national government enjoyed some general authority to legislate for the public welfare, since this authority had been reserved to the states. But the Court's hostility toward governmental power was broader than mere federalism concerns—it extended to the scope of governmental authority as a whole. The decisions in *Reagan v. Farmers' Loan & Trust Co.*[1706] and *Lochner v. New York*[1707] invalidated state legislation as violating the Fourteenth Amendment property and contract rights of individuals. In these cases the Court's emphasis was on monitoring the boundaries between individual constitutional rights and governmental authority and preventing the government's accretion of "all-pervading power."[1708]

1701. 156 U.S. 1 (1895) (invalidating the Sherman Act).

1702. 158 U.S. 601 (1895) (invalidating the federal income tax).

1703. 208 U.S. 161, 179 (1908) (invalidating federal law banning anti-union practices by the railroad industry).

1704. Despite the fact that the law applied to railroad transport, a classic vehicle of interstate commerce, the *Adair* Court concluded that the promotion of labor unions did not facilitate commerce. *Id. See also* The Employers' Liability Cases, 207 U.S. 463, 499 (1908) (striking down a labor statute that banned common-law defenses to occupational injuries); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (invalidating a congressional measure to ban interstate movement of goods made with child labor).

1705. *E.C. Knight*, 156 U.S. at 12.

1706. 154 U.S. 362 (1894) (invalidating state-imposed railroad rates as denying railroads a fair rate of return under the Equal Protection and Takings Clauses).

1707. 198 U.S. 45, 56 (1905) ("[T]here is a limit to the valid exercise of the police power by the State . . . . Otherwise the Fourteenth Amendment would have no efficacy and the . . . States would have unbounded power . . . .").

1708. *Id.* at 59. *See also Reagan*, 154 U.S. at 399 (Brewer, J.) ("This . . . is a government of law, and not a government of men, and it must never be forgotten that under such a government,

In strictly limiting governmental authority in these cases, the Court repeatedly rejected any appeal to inherent powers or necessity. Thus, in invalidating the federal income tax in *Pollock*, Chief Justice Fuller stressed the "delegated" nature of federal authority and expressly rejected the argument that the taxation power was a necessary concomitant power of sovereignty:

> [I]t is said that the United States as "the representative of an indivisible nationality, as a political sovereign equal in authority to any other on the face of the globe . . . ," would be "but a maimed and crippled creation after all," unless it possesses the power to lay a tax on the income of real and personal property . . . .
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> [W]e are thus invited to hesitate in the enforcement of the mandate of the Constitution . . . lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.[1709]

Justice White, in dissent, complained that the majority had deprived the government "of an inherent attribute of its being, a necessary power of taxation."[1710] Justice Harlan, in his dissents in both *Pollock*[1711] and *E.C. Knight*, similarly argued from necessity to attack the Court for stripping the national government of an essential power.[1712] Finally, in the territory case of *Kansas v. Colorado*, the Court unanimously dismissed the government's theory that "the doctrine of sovereign and inherent power" justified a national authority to reclaim eroding lands or to interfere with water use by states.[1713] Thus, the Court's domestic decisions affirmed the existence of a "late-nineteenth-century orthodoxy" in which the Court viewed its role in domestic cases as enforcing the social contract by policing the boundaries of governmental power.[1714]

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with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property . . . .").

1709. *Pollock*, 158 U.S. at 634. The Constitution could be amended if the delegated powers proved unworkable. *Id.* at 635.

1710. *Id.* at 715 (White, J., dissenting) (emphasis added).

1711. *Id.* at 680, 685 (Harlan, J., dissenting).

1712. *E.C. Knight Co.*, 156 U.S. at 45 (Harlan, J., dissenting) (maintaining that the authority of the national government "should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish"). Harlan emphasized that the power to regulate the American Sugar monopoly must exist in the Commerce Clause, because sugar was a necessity of life and the national government was the only sovereign authority powerful enough to regulate such conduct. *Id.* at 44–45.

1713. Kansas v. Colorado, 206 U.S. 46, 89 (1907). The only domestic case of the era which arguably relied on an inherent powers analysis was the 1884 decision in the *Legal Tender Cases*, which, as discussed above, can be attributed to authority claimed by the national government through exercise of the taxation power. *See supra* notes 846–54.

1714. *Id.* at 89–90 (affirming the Court's obligation to defend powers reserved to the people).

The stark contrast between the Court's domestic and foreign affairs jurisprudence raises two questions for the inherent powers cases. First, why was the Court willing to authorize such sweeping, unrestrained federal power in the foreign affairs realm? Why, for example, was it "necessary" to uphold the subjugation of the Philippines, but not a federal income tax or state labor legislation? Why, in particular, was the power upheld in nearly as complete and unqualified a form as the powers held by autocratic European states? And second, once the Court decided to uphold this broad authority, why was it willing to locate the source of authority in international, inherent powers, rather than in the constitutional text?

As discussed below, the answer to these questions appears to lie in a complex convergence of racial and ascriptivist impulses, imperialist ambitions, and concerns about dual federalism in the domestic sphere. Arguments derived from international law, social contract theory, territoriality, necessity, and the underdevelopment of individual rights were offered as doctrinal explanations for the Court's decisions, but did not compel the resort to inherent powers. Nativism and imperialist ambitions explain the substantive results the Court reached as well as the Court's desire to uphold sweeping national authority, but do not fully explain the Court's willingness to resort to the anomalous doctrine of unenumerated, inherent powers. The late-nineteenth-century Court's obsession with dual federalism, by negative implication, justified the resort to inherent powers by establishing (in the Court's mind), a protected sphere in which plenary foreign affairs powers would not infringe upon state authority in the domestic sphere. In the end, it was federalism, combined with the late-nineteenth-century Court's authoritarian desire to uphold an expansive foreign affairs authority, which created the inherent powers doctrine.

A. Doctrinal Justifications for an Anomalous Doctrine

The Court explained the legal conclusions it reached through theories of international law, territoriality, social contract, necessity, and limited individual rights protections. But the Court's doctrinal justifications for the holdings ultimately are unsatisfying as an explanation for the resort to inherent powers. Substantive principles of international law regarding state power in the Indian and alien contexts were in conflict, and nothing in international law required that Congress should be free of ordinary constitutional constraints. International law simply had nothing to say about the extent to which domestic law might constrain governmental power. Social contract theories based on citizenship also were not ultimately controlling, because even after Congress bestowed citizenship on Indians and territorial inhabitants, the Court continued to uphold plenary federal power.

Nor did territoriality fully explain the Court's conclusions. Indians, of course, were present in U.S. territory, and that very presence was used to

justify plenary power over them. Aliens in exclusion proceedings were located either on boats in San Francisco harbor or on the mainland, and aliens in deportation proceedings were all physically present in the United States. Territoriality could justify the lack of constitutional constraint in this context only if the Court fictitiously "deemed" that these actions occurred outside the United States. The Insular territories indisputably were U.S. sovereign territory. In *Ross*, on the other hand, the United States *was* acting extraterritorially, pursuant to the treaty power.[1715] But Japan had consented to the operation of U.S. law, and the vessel at issue was subject to U.S. jurisdiction, so neither territoriality nor comity logically barred the Constitution's application.

Individual rights objections received scant consideration in the inherent powers cases,[1716] and some commentators have suggested that the underdeveloped state of individual rights jurisprudence explains the lack of constraint on federal power in these areas. This was the age of *Plessy v. Ferguson*,[1717] in which common-law and state-law protections, rather than the Constitution, often formed the primary defenses of the individual. Due process did not enjoy the robust meaning it would later acquire, and equal protection did not apply to the national government.[1718] Even if the *Plessy*-era Court had adjudicated an equal protection claim, moreover, a reasonableness standard would have applied, and Justice Field, at least, thought exclusion of the Chinese was reasonable. Thus, there would have been little basis for the Chinese in *Chae Chan Ping* and *Fong Yue Ting* to challenge national action under the Equal Protection Clause.

Nevertheless, the apologia for the cases based on weak individual rights protections should not be overstated. The decisions in *Chy Lung*, *Yick Wo*, *Wong Wing*, and numerous cases from the western territories, as well as the decisions in *Reagan*, *Lochner*, and *Adair*, invalidated a range of governmental actions as infringing on individual rights. Litigants in the inherent powers cases repeatedly asserted such rights, many of which, such as the right to jury trial, were well established in Anglo-Saxon jurisprudence. Congressional opponents repeatedly invoked basic constitutional protections to condemn the exercise of broad national power. The opinions of jurists such as Fuller, Harlan, Brewer, and Field, and the persistent willingness of the lower federal courts to afford due process protections to aliens in habeas

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1715. *In re* Ross, 140 U.S. 453 (1891).

1716. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); *In re* Ross, 140 U.S. 453 (1891); The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); and the later *Insular Cases*, *supra* note 45.

1717. Plessy v. Ferguson, 163 U.S. 537 (1896).

1718. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Fifth Amendment Due Process Clause applies basic equal protection principles against the federal government).

corpus proceedings, also demonstrate that a competing approach was available to the Court in the form of the enumerated powers-limited government doctrine which the Court was energetically applying in the domestic realm.

The concept of necessity also appeared repeatedly throughout the evolution of the inherent powers doctrine. Madison and Jefferson resorted to the language of necessity to explain the Northwest Ordinance and the Louisiana Purchase, respectively. In *Johnson v. M'Intosh*, Chief Justice Marshall upheld the discovery doctrine as "indispensable to that system under which the country has been settled,"[1719] and *Kagama* upheld the Indian power on the grounds that the authority "must exist" and "can be found nowhere else."[1720] Justice Field in *Chae Chan Ping* invoked "necessit[ies]" as urgent as "war" to uphold the exclusion of aliens,[1721] and "the necessities of the case" were repeatedly asserted to support the *Insular* decisions.[1722]

Learned Hand described the doctrine of necessity as the process of "interpolat[ing] into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand."[1723] Hand viewed this doctrine as applying "with [special] force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforseen occasions, must be cast in general language, unless they are constantly amended."[1724] And it would seem that on some level, arguments from necessity in constitutional interpretation may be justified. Like Voltaire's God, if the war power did not exist in the Constitution, would it not be necessary to invent it? Once Louisiana was purchased, the reality was that these lands would have to be governed. Similarly, when the need arose, it made sense that some governmental power must exist to regulate the influx of aliens. And as a structural matter, having once concluded that the power must exist, the Court plausibly vested power over Indians, immigration, and new territories in the national government due to "some sense of the inevitable fitness of things."[1725]

Necessity, however, can mean many things and serve many purposes. Jefferson invoked necessity not to justify the Louisiana Purchase's

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1719. Johnson v. M'Intosh, 21 U.S. 543, 591 (1823).

1720. United States v. Kagama, 118 U.S. 375, 380 (1886).

1721. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

1722. *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1, 196 (1901).

1723. LEARNED HAND, THE BILL OF RIGHTS 14 (1958).

1724. *Id.* at 14–15.

1725. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 195–96 (1963); *see also* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1964) (addressing arguments drawn from "inference[s] from the struetures and relationships created by the constitution"); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 4 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 16–17 (1991).

constitutionality, but to explain the constitutional *violation*.[1726] Necessity could be invoked, as Justice Harlan did in *E.C. Knight*, to demonstrate why a power should exist in a particular enumerated provision.[1727] And the extended debate over the meaning of the Necessary and Proper Clause suggests that the mere invocation of necessity should not justify an action under our constitutional structure. In the inherent powers decisions, however, necessity was invoked *in place* of any enumerated powers analysis to justify the power's legality.[1728] Moreover, the Court rarely, if ever, made any effort to demonstrate that its reliance on necessity was warranted. Was an unlimited power to exclude returning, lawful permanent residents in *Chae Chan Ping* even plausibly as essential as the power to wage war? Resort to necessity does not explain why the Court felt justified in relying on extraconstitutional sources of authority, nor does it explain why the powers were not subject to constitutional limits. And again, it does not explain why the Court was willing to invoke necessity to uphold extratextual authority over foreign relations but rejected the argument in domestic cases such as *Pollock* and *E.C. Knight*.

In sum, the doctrines derived from international law, social contract theory, territoriality, individual rights, and arguments from necessity provided a framework for the Court to articulate the inherent powers theory, but ultimately did not determine the outcome of the inherent powers cases. These were doctrinal justifications offered for outcomes reached for other reasons. In the end it was not doctrine that tipped the balance in favor of inherent powers, but the nativist, authoritarian, and imperialist aspirations and federalism concerns that uniquely characterized the Gilded Age.

B. The Will to Power: Nativist Authoritarianism and the Gilded Age

The Gilded Age was a period of audacious, relentless industrial expansion and feverish exploitation of the nation's human and natural resources which transformed America into an industrial giant by 1900.

1726. As Jefferson put it, "A strict observance of the written law is doubtless *one* of the high duties of a good citizen but it is not *the highest*. The laws of necessity, or self-preservation, of saving our country when in danger, are of higher obligation." 1810 letter to John Colvin, *quoted in* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 252 (1994). For further discussion of the relationship between necessity and constitutional analysis, *see* BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1725, at 17–18 (noting that prudential arguments in constitutional interpretation are most likely to be decisive in times of national emergency).

1727. *See supra* note 1711.

1728. *E.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (discussing the necessity of self-preservation arising from "vast hordes . . . crowding in upon us"). Justice Campbell argued in *Dred Scott* that "the powers of Congress [over the territories] originated from necessity, and arose out of and were only limited by events, or, in other words, they were revolutionary in their very nature. Their extent depended upon the exigencies and necessities of public affairs." Scott v. Sandford, 60 U.S. (19 How.) 393, 505 (1856) (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199, 232 (1796) (Chase, J., seriatim opinion)).

Railroad and mining interests fueled the era's hunger for Indian lands, while industrialists craved immigrant labor in America's cities. Capitalist growth also fed the search for cheap resources and new markets abroad as industrialists, having completed their conquest of America, turned outward. But the Gilded Age also was a period of tremendous insecurity for the American people.[1729] Industrialization produced rapid urbanization, the influx of millions of new immigrants from Southern and Eastern Europe and Asia, and the emergence of urban poverty, all of which transformed American cities. Growing economic stratification between rich and poor resulted, by 1890, in one percent of the populace controlling more than half of the country's wealth.[1730] Severe economic depressions in the 1870s and 1890s, along with class struggle and labor agitations such as the Haymarket Riot of 1886 and the Pullman strike of 1894, challenged conceptions of American equality, while the 1890 closing of the western frontier prophesied the end of America's golden era.[1731] The resulting insecurity was reflected in many of the cultural and intellectual movements of the day. Edward Bellamy's popular 1887 novel *Looking Backward* examined the era's social and economic inequities, and eataclysmic thought was a common theme in contemporary literature.[1732]

Beyond U.S. borders, pressures and insecurities were generated by the rise of European industrialization, nationalism, and colonial "jingoism." The late 1800s were the era of high imperialism in Europe, as European states such as Germany and Italy, which had not previously held colonies, saw colonial expansion as a way to assert their equality in the face of British industrial hegemony. The 1884 Berlin Conference, the ensuing scramble for Africa, and the partition of China all reflected imperial industrial impulses. Britain also reinvigorated its colonial project in an effort to secure its empire against European rivals and to reassure itself of its own international supremacy. Having formalized political control over India in 1858, Britain invaded Egypt in 1882, reconquered the Sudan, and gained supremacy over southern Africa in the Boer Wars of the 1890s.[1733] These European imperialist conquests were conducted unhindered by American liberal

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1729. *See, e.g.*, JOHN TOMSICH, A GENTEEL ENDEAVOR: AMERICAN CULTURE AND POLITICS IN THE GILDED AGE, 1877–1920 (1971); ROBERT WIEBE, THE SEARCH FOR ORDER (1967); PAUL CARTER, SPIRITUAL CRISIS OF THE GILDED AGE (1971).

1730. SMITH, *supra* note 95, at 348.

1731. *See, e.g.*, FREDERICK JACKSON TURNER, THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY (1893).

1732. Predictions of pending catastrophe were expressed in writings such as Brooks Adams's *Law of Civilization and Decay* (1893) and Mary E. Lease's *The Problem of Civilization Solved* (1895). *See* FREDERIC COPLE JAHER, DOUBTERS AND DISSENTERS: CATACLYSMIC THOUGHT IN AMERICA, 1885–1918 (1964).

1733. *See, e.g.*, RONALD ROBINSON & JOHN GALLAGHER, AFRICA AND THE VICTORIANS (2d ed. 1981); A.P. THORNTON, THE IMPERIAL IDEA AND ITS ENEMIES (2d ed. 1985); THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA 1876–1912 (1991).

republican ideologies regarding citizenship and self-government—a fact noted with envy by U.S. expansionists. International law likewise was shaped and molded during the era by the desire to justify the colonial project.[1734]

All of these forces combined to create a sense of alienation, instability, and paranoia among traditional Anglo-Saxon Protestant American elites in the last decades of the 1800s. The radieal transformation of American society and competitive pressures from authoritarian European expansionism made the egalitarian impulses of the Reconstruction era and traditional liberal republican ideology seem naive, antiquated, and quaint. Many legal and political elites responded by attempting to preserve traditional Anglo-Saxon values through the forging of a deeply racialized and hierarchical social and legal order. Thus, the 1880s and 1890s saw the "repudiation of Reconstruction egalitarianism and inclusiveness in favor of an extraordinarily broad political, intellectual, and legal embrace of renewed ascriptive hierarchies."[1735] Nativist xenophobia and imperialist, nation-building impulses became the touchstones of a general cultural project to reinvigorate the old WASP elites in the face of new challenges and to fashion a more openly hierarchical, authoritarian, and racial ordering of American citizenship and nationhood.[1736] The result was a peculiarly illiberal and authoritarian era in American life.[1737]

1. Nativist Ideology.—Theories of the manifest destiny of the white race had been common in both Europe and the United States throughout the nineteenth century and historically had competed with more egalitarian, caste-free democratic visions of American society. By the end of the century, however, this impulse combined with new pseudo-scientific theories

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1734. *See, e.g.*, Anghie, *supra* note 136.

1735. SMITH, *supra* note 95, at 347. *See also* William Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 51 (1999) (noting the destruction of the Populist movement's commitment to multiracial democracy in the face of "the increasingly virulent racism of white America in the first decades of the twentieth century").

1736. The racist impulse was not limited to the nation's elites, of course. Within the labor movement during the same period, the inclusive Knights of Labor, which had welcomed women, blacks, and immigrants, were supplanted by Samuel Gompers's more conservative and exclusive American Federation of Labor, which enthusiastically supported the restrictive Chinese immigration policies. *See generally* ALEXANDER SAXTON, INDISPENSIBLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1971); SAXTON, THE RISE AND FALL OF THE WHITE REPUBLIC (1990). Indeed, working class support for the Chinese exclusion policies may have been critical in galvanizing a previously regional issue into a national cause. *See* GYORY, *supra* note 770, at 237–38 (recalling the political targeting of the American working class to gain support for the Chinese exclusion laws).

1737. For further discussion of racial attitudes at the turn of the century and their impact on national politics, see MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 203–20 (1998); NELL IRVIN PAINTER, STANDING AT ARMAGEDDON: THE UNITED STATES 1877–1919 (1987).

of racial superiority to justify the exclusion of other peoples from democratic governance. Charles Darwin's *The Descent of Man* and Herbert Spencer's *Social Statics* purported to provide scientific support for Anglo-Saxon superiority.[1738] Andrew Carnegie invoked Darwinian evolutionary theories to justify industrial inequities,[1739] while eugenicists such as Francis Galton and Charles Davenport gave scientific credence to the view that governmental control was necessary to prevent the genetic spread of inferior races.[1740] Historians, social theorists, and politicians attributed America's democratic promise and political values to characteristics uniquely inherent in Anglo-Saxon blood.[1741] Henry Cabot Lodge, who championed in Congress both race-based immigration restrictions and imperial control over the Insular possessions, warned against mongrelization of the Anglo-Saxon race.[1742]

In this context, American birthright and the capacity for democratic governance came to be viewed by many as synonymous with white, Anglo-Saxon, Protestant, male descent. Non-Anglo-Saxon groups were considered biologically and intellectually inferior, carriers of disease, and populations that would dilute American blood and institutions. Charles Carroll's popular book, *The Negro Beast*, published in 1900, portrayed blacks as biologically similar to apes.[1743] Indian social ethnologists such as Lewis Henry Morgan and John Wesley Powell, while contending that all humans were capable of progress, considered Indians to be in a barbarian stage of development.[1744] Forcible assimilation policies reflected views of Indians as racially inferior groups whose culture was incapable of survival in the face of the inexorable advance of white civilization. Those who adequately abandoned their

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1738. CHARLES DARWIN, THE DESCENT OF MAN (1871); HERBERT SPENCER, SOCIAL STATICS (1892). It was Spencer who transformed Darwin's evolutionary theories into a social doctrine of "survival of the fittest."

1739. *See* Andrew Carnegie, *Wealth*, 148 N. AM. REV. 653 (1889), *reprinted in* A DOCUMENTARY HISTORY OF THE UNITED STATES 172–79 (Richard D. Heffner ed., 12th ed. 1965) (arguing that competition insures survival of the fittest, even in the industrial context).

1740. *See* Daniel Kevles, *Annals of Eugenics: A Secular Faith*, THE NEW YORKER, Oct. 8, 1984, at 5. The term "eugenics" was coined in 1883 by Charles Darwin's eousin, Francis Galton, who sought to use Darwinian scienee to improve human stock "by giving the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable." *Id.* at 51.

1741. *See* THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 73–122 (1963) (exploring race theories in early America and the "Teutonic origins" theory); RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 172–77 (rev. ed. 1955) (labeling Anglo-Saxon dogma as a key ingredient in American racism); SALYER, *supra* note 769, at 11 (describing the supposed biological and cultural superiority of Americans). *See generally* Edward Norman Saveth, *Race and Nationalism in American Historiography: The Late Nineteenth Century*, 54 POL. SCI. Q. 421, 423–30 (1939) (tracing the roots of the Anglo-Saxon mindset of superiority).

1742. GLENN C. ALSCHULER, RACE, ETHNICITY, AND CLASS IN AMERICAN SOCIAL THOUGHT, 1865–1919, at 44 (1982).

1743. *Id.* at 21.

1744. SMITH, *supra* note 95, at 391.

cultural traditions and assimilated were to be rewarded with U.S. citizenship. Those who failed were deemed destined for annihilation.

The new Catholic and non-Christian immigrants likewise were seen as biologically and culturally inferior "alien races," who were racially unfit for U.S. citizenship.[1745] Policymakers of the day attempted to assimilate "non-white" European immigrants, but Asian immigrants came to be viewed as incapable of adopting Anglo-Saxon values or participating in democratic governance. As early as 1862, works such as Dr. Arthur Stout's *Chinese Immigration and the Physiological Causes of the Decay of the Nation* were embraced to emphasize the incompatibility of non-European immigrants with American political institutions.[1746] The Republic was imperiled by unrestricted immigration, and the new immigrants were corrupting both the U.S. bloodstream and U.S. politics.[1747]

The solution of the national elites was to exclude unfit groups from the full benefits of constitutional membership. Given the era's assumptions about the inferiority of non-Anglo-Saxon peoples, and the conception of the Constitution as a compact based on Anglo-Saxon principles, citizenship alone was insufficient to establish full membership. The blessings of constitutional liberty were largely secured only to those citizens who were the true inheritors of the Anglo-Saxon constitutional compact. Legislation and judicial rulings defined and enforced a tier of second-class citizens who were substantially excluded from full constitutional protections. Female citizens were legally excluded from political and professional life and relegated to a separate domestic "sphere" through policies that were upheld in decisions excluding women from jury duty,[1748] bar membership,[1749] and the vote.[1750] Southern blacks were segregated from political life as the federal Reconstruction effort was abandoned in favor of the Jim Crow policies of Southern whites. The Supreme Court facilitated this process by invalidating much of the Reconstruction civil rights agenda[1751] and then upholding de jure

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1745. *See* JACOBSON, *supra* note 1737 (examining the racialization of American immigration law and the new immigrants' dubious fitness for American citizenship).

1746. SALYER, *supra* note 769, at 11 (characterizing Stout's work as one of several that alerted Americans to the alleged dangers of the Chinese).

1747. *Id.*

1748. Strauder v. West Virginia, 100 U.S. 303 (1879).

1749. *In re* Lockwood, 154 U.S. 116 (1894); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

1750. France v. Connor, 161 U.S. 65, 69 (1896). *See also* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874). For further discussion, see Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440–74 (1998).

1751. *See* The Civil Rights Cases, 109 U.S. 3, 25 (1883) (invalidating the Civil Rights Act of 1875); United States v. Harris, 106 U.S. 629 (1882) (striking down section two of the Klan Act, which made it criminal for two or more persons to conspire to deprive any person of equal protection or their privileges and immunities); United States v. Cruikshank, 92 U.S. 542 (1875) (invalidating indictments for conspiracy to interfere with black voting rights in state elections on the

segregation in *Plessy v. Ferguson.*[1752] Elites of the day regularly drew comparisons between blacks, Indians, Chinese, Filipinos, and other groups to determine their relative inferiority in the racial hierarchy. And many members of the late-nineteenth-century elite acknowledged the links between the "problems" of ruling blacks in the southern United States and the non-white inhabitants of the new territories.[1753] The United States' authoritarian policies also extended to the aggressive suppression of the despised Mormon Church, whose dismemberment the Supreme Court upheld in the name of suppressing polygamy and preserving Christian civilization.[1754] The perceived helplessness of women, children, Indians, colonized peoples, and other "inferior" groups was also used to justify greater state intervention over them. In striking down protective labor legislation for bakers in *Lochner v. New York*,[1755] for example, Justice Peckham reasoned that the bakers seeking relief were "in no sense wards of the State" or otherwise in need of its special protection.[1756] In short, all citizens were equal, but some citizens were more equal than others. The policies of the day directly contradicted the Fourteenth Amendment's purpose of providing equal citizenship and preventing a permanent subordinate caste in the United States.

2. Nation-Building and Imperial Expansion.—Vigorous American expansionism abroad was also a direct response to the insecurity of national elites and views of racial superiority. The Civil War had been fought to reaffirm the strength, unity, and supremacy of the national government. By the late 1800s, the wounds of the war had sufficiently healed, and northern

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ground that they did not involve rights proteeted by the Constitution); United States v. Reese, 92 U.S. 214, 220–21 (1875) (striking down sections three and four of the Force Act as overbroad and thus failing to cnact "appropriate legislation" to enforce the Fifteenth Amendment); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (restricting interpretation of the Reconstruction Amendments).

1752. 163 U.S. 537 (1896) (Brown, J.).

1753. A. Lawrence Lowell, the Harvard government professor whose theory of territorial incorporation was embraced by the Court in the *Insular Cases*, advocated discnfranchisement of the Chinese, African Americans, and Filipinos, among others, because only the "Anglo-Saxon race" was prepared for self-rule. *See* Lowell, ATLANTIC MONTHLY, *supra* note 1397, at 149–54. As a junior member of Congress from 1901 to 1903, George Sutherland, who became the Supreme Court's author of *Curtiss-Wright*, advocated continuing thc Chinese Exclusion Act on the grounds that "[w]e already have one race problcm in the South with the negroes, and to open our doors to the unrestricted immigration of Mongolians would be to invite another and more serious race problem in the West." PASCHAL, *supra* note 47, at 41 (quoting SALT LAKE TRIBUNE, Nov. 14, 1901).

1754. The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) ("The organization of a community for thc spread and practiee of polygamy is, in a measure, a return to barbarism. It is contrary to the . . . Civilization which Christianity has produced in the Western world.").

1755. 198 U.S. 45, 64 (1905).

1756. *Id.* at 57. *Cf.* Mullcr v. Oregon, 208 U.S. 412, 421 (1908) (upholding a restriction on the working hours of women because women, as wards of the state and outsiders of the constitutional community, were subject to greater legislative intervention). *See* FISS, *supra* note 668, at 177–78.

and southern white elites had sufficiently reconciled over the subject of black political rights, that the nation was able to unite to assert itself internationally as a fully sovereign state. The United States, as an emergent industrial power, shared the imperialist ambitions of its European neighbors. Colonial control, however, by definition, required governance of an inferior foreign populace under distinctly different legal rules than those prevailing in the metropole. Thus, conviction in the superiority and manifest destiny of the white race, and a desire to assert the United States' position as an equal among nations, led the United States to seek colonies in the far-flung reaches of the globe. Nationalist sentiment inspired plenary power as the United States sought "a place among the world Powers and a share in the colonial game."[1757]

The acquisition of Puerto Rico, Guam, and the Philippines during the Spanish-American War provided this opportunity. Both nation-building and xenophobia pervaded the ensuing debate over the legal status of these islands. While the application of the Constitution to Guam, Puerto Rico, and the Philippines was bitterly fought, all participants in the debates of 1898–99 agreed on the racial and cultural inferiority of the islands' Hispanic and Asian inhabitants.[1758] Proponents of colonial rule relied on this inferiority to conclude that authoritarian U.S. control was morally required. Anti-imperialists, conversely, contended that the Constitution must apply to Filipinos and Puerto Ricans, knowing that the obvious unfitness of the "ignoran[t] and inferior[]" "mongrels of the east" for democratic governance would render the imperial adventure untenable.[1759]

Rudyard Kipling's poem *The White Man's Burden*, which was drafted in 1899 to encourage the United States to govern and civilize the Philippines,[1760] vividly illustrates the convergence of nation-building and racial superiority in the colonial enterprise. The poem admonished the United States to "Take up the White Man's burden—" over "those ye better," "Your new-caught, sullen peoples, Half devil and half child." It concluded by urging that in so doing, the United States would join the realm of mature nations:

> Take up the White Man's burden—
> Have done with childish days—
> The lightly proffered laurel,
> The easy, ungrudged praise.
> Comes now, to search your manhood

1757. Pitman B. Potter, *The Nature of American Territorial Expansion*, 15 AM. J. INT'L L. 189, 194 (1921).

1758. *See supra* Part V(G).

1759. SMITH, *supra* note 95, at 431.

1760. *See* STANLEY KARNOW, IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 17 (1989). *See also* 56 CONG. REC. 2621, 2629–30 (1900) (statement of Sen. Henry Cabot Lodge).

> Through all the thankless years
> Cold, edged with dear-bought wisdom,
> The judgment of your peers![1761]

Mark Twain took a different approach to the Philippine conquest, concluding that the United States, now that it was militarily powerful, had chosen to "wipe its feet on the Declaration [of Independence] and look around for something to steal."[1762]

3. Nativism, Imperialism, and Inherent Powers.—The racist and nationalist views of the day go far in explaining the substantive outcomes reached in the inherent powers decisions, such as the Court's willingness to restrict the constitutional protections of Indian, immigrant, and territorial groups, and to legitimate sweeping national power. The policies upheld in the inherent powers cases were the direct product of these authoritarian, nationalist, and segregationist impulses. The period between 1880 and 1900 saw the aggressive and unprecedented exertion of national power by Congress over Indians, immigrants, and territorial inhabitants. Following the termination of treaty-making with the tribes in 1871, Congress extended federal criminal jurisdiction over Indian tribes in 1885, allotted Indian lands in the Dawes Act of 1887, and by the 1890s claimed the unilateral right to dissolve Indian land claims and to dismantle tribes. In 1882, Congress both stripped Mormon polygamists of the right to vote and reversed a hundred-year open door immigration policy to exclude an entire class of aliens based expressly on race. Congress followed the Chinese exclusion acts of 1882–88 by limiting non-Chinese immigrants' right to judicial review of exclusion proceedings, and in 1892 authorized the summary deportation of resident aliens for the first time since the notorious Alien Act. After flexing its muscle by forfeiting the Mormon Church property in the 1880s, Congress in the 1890s acquired overseas territories with inhabitants whom it expressly intended to govern as non-citizen subjects.[1763] The policies adopted in each of these areas had been advocated by some minority voices for much of the century. But it was not until the last decades of the nineteenth century that a majority of the national political elites were willing to assent to such extraordinary power.

It was precisely to affirm these exclusionary and hierarchical policies of Indian dissolution, Chinese exclusion, and colonial governance that the

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1761. RUDYARD KIPLING, *The White Man's Burden* (1899), *reprinted in* THE COMPLETE VERSE 261–62 (1990).

1762. MARK TWAIN, *The Secret History of Eddypus, the World Empire*, *in* MARK TWAIN'S WEAPONS OF SATIRE 81, 85 (Jim Zwick ed., 1992); *see also* TWAIN, *To The Person Sitting in Darkness*, *in* MARK TWAIN'S WEAPONS OF SATIRE, *supra*, at 22; TWAIN, *Review of Edwin Wildman's Biography of Aguinado*, *in* MARK TWAIN'S WEAPONS OF SATIRE, *supra*, at 86.

1763. *See* discussion of the *Insular Cases*, *supra* Part V(G).

Supreme Court adopted the inherent powers doctrine.[1764] And in all three areas, the Court acted in response to clear directives from Congress. The inherent powers doctrines in *Kagama* and *Chae Chan Ping* were adopted after the Court attempted to moderate existing congressional legislation,[1765] and Congress expressly reversed the Court. In the *Insular Cases*, the question of U.S. authority to acquire and govern possessions was bitterly fought both in Congress and in the presidential election of 1900. After Congress rejected citizenship for the territories in the Foraker Act and William McKinley was re-elected on a pro-imperial platform, the Court declined to find anything in the Constitution that barred the action. Even the Court's decisions regarding the effect of Indian citizenship were dictated by Congress. Congress responded to the Court's 1905 ruling that citizenship removed Indians from federal guardianship by suspending Indian citizenship, and the Court retreated to hold that citizenship was irrelevant to ward status.[1766]

The executive branch also contributed significantly to the development of the inherent powers doctrine. Although the Court independently developed the inherent powers theory in *Kagama*, in both the alien and territories cases, the executive branch expressly urged an inherent powers rationale before the Court embraced it. And in both of these areas, the United States pressed for broader authority than the Court ultimately proved willing to grant—authority that would have left both aliens and territorial inhabitants utterly without constitutional protection from national power. In short, the Supreme Court's embrace of inherent powers substantially reflected its acquiescence in the authoritarian policies of Congress and the executive. The Court did indeed follow the "iliction returns," and if anything only modified the authoritarian impulses of the political branches.

Thus, it was the felt "necessities" of the day that inspired the substantive results reached in the inherent powers cases as well as the Court's desire to articulate an extremely broad national foreign affairs power. The Court's decisions fully embraced the pervasive xenophobic and nationalist sentiments of the time. The deeisions are rife with attitudes of racial

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1764. *See* United States v. Kagama, 118 U.S. 375 (1886) (upholding the Major Crimes Act of 1885); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding the Chinese Exclusion Act); The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding the dissolution of the Mormon Church); The Insular Cases, *supra* note 45 (upholding colonial governance of the Insular possessions).

1765. *See Ex parte* Crow Dog, 109 U.S. 556 (1883) (construing a federal statute as not authorizing federal prosecution of a murder between two Indians); Chew Heong v. United States, 112 U.S. 536 (1884) (reading the Chinese Exclusion Act as consistent with the treaty to authorize entry of aliens).

1766. *See supra* notes 521–23 and accompanying text.

hierarchy,[1767] which ultimately prevailed even over citizenship in the Court's analysis.[1768] The nationalist impulses of the era were also reflected in the Court's vision of the post-Civil War national government as a powerful and effective sovereign in its sphere, which enjoyed all the powers held by other sovereign states.[1769] And although one might assume that the Court's attitude toward the foreign affairs cases was motivated by a Hobbesian concern about the lawless nature of international relations, the Court's rhetoric, at least, had much more to do with the aggrandizement of national power.

1767. The major Indian decisions frequently relied on the Indians' status as an "unfortunate," vice-ridden, subordinate race to justify the assertion of paternalistic federal authority. *See, e.g.*, United States v. Rogers, 45 U.S. (4 How.) 567, 570–72 (1846). Justice Van Devanter's 1913 opinion in *United States v. Sandoval* expressly invoked pseudo-scientific theories of Indians as "ignoran[t]," "degraded," "primitive," "crude," "simple," "inferior," and prone to "superstition and fetishism," to neutralize the citizenship claims of the Pueblo Indians. 231 U.S. 28, 45, 39 (1913). Justice Field's decision in *Chae Chan Ping* portrayed Chinese immigrants as "strangers in the land" and apparently embraced the position of the California Constitutional Convention that immigrants were "an Oriental invasion" and a "menace to our civilization" who were incapable of assimilation. *Chae Chan Ping*, 130 U.S. at 595.

1768. *See Sandoval*, 231 U.S. at 48 ("[C]itizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people."); United States v. Celestine, 215 U.S. 278, 290 (1909) (holding that the political question doctrine barred judicial consideration of a challenge by an Indian who had become a citizen); United States v. Nice, 241 U.S. 591, 598 (1916) ("Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection."); Balzac v. Porto Rico, 258 U.S. 298, 307–11 (1922) (holding that citizenship did not grant constitutional rights); Mackenzie v. Hare, 239 U.S. 299, 311 (1915) (holding that marriage to a foreigner strips a female national of citizenship). Even Anglo-Saxon male citizens were not entitled to full constitutional protection if they ventured beyond the borders of the United States. *In re* Ross, 140 U.S. 453 (1891); *cf. Balzac*, 258 U.S. at 309.

1769. *See, e.g.*, *Chae Chan Ping*, 130 U.S. at 605 ("[T]he United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality.") (quoting The Legal Tender Cases, 79 U.S. 457, 555 (1871) (Bradley, J., concurring)). Dissenting in *Pollock v. Farmers' Loan & Trust Co.*, Justice White contended:

> It is, I submit, greatly to be deplored that after more than one hundred years of our national existence, after the government has withstood the strain of foreign wars and the dread ordeal of civil strife, and its people have become united and powerful, this court should consider itself compelled to go back to a long repudiated and rejected theory of the constitution, by which the government is deprived of an inherent attribute of its being, a necessary power of taxation.

Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 715 (1895) (White, J., dissenting). The role of the Civil War in cementing the national union was later eloquently set forth by Justice Holmes in *Missouri v. Holland*:

> [The Constitution] called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

252 U.S. 416, 433 (1920). For further discussion, see JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 131–52 (1990); Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1646 (1999).

The nativist and nationalist impulses combined particularly powerfully in the *Insular Cases*. The Court's decisions here appear largely motivated by an expansionist desire to acquire territory in the far reaches of the earth and a xenophobic desire to deny the inhabitants of those regions participation in the American birthright. The dissenters in *De Lima v. Bidwell*, who later formed the *Insular* majority, contended that a pro-colonial ruling would give the United States "an 'equal station among the Powers of the earth.'"[1770] Defense of the American birthright also became a sovereign national goal as the Court expressly sought to exclude from American citizenship those "absolutely unfit to receive it."[1771] As Justice White argued in *Downes*:

> To concede to the government of the United States the right to acquire [new territories], and to strip it of all power to protect the birthright of its own citizens . . . is, in effect, to say that the United States is helpless in the family of nations.[1772]

Absolute control of birthright and national sovereignty went hand in hand. The power to conquer foreign peoples, and to exclude them from the national polity, was the very essence of a civilized state. Justice Brown, who was both the author of *Plessy* and a self-avowed member of the old Anglo-Saxon race,[1773] concluded his opinion in *Downes v. Bidwell* with a clarion call for white supremacy and American expansionism:

> A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. *If those possessions are inhabited by alien races*, differing from us in religion, customs, laws, methods of taxation, and modes of thought, *the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible*; and the question at once arises whether large concessions ought not to be made . . . . *We decline to hold that there is anything in the Constitution to forbid such action.*[1774]

Racial hierarchy and authoritarianism had become central to the American national identity. As Chief Justice White later commented in reflecting on

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1770. De Lima v. Bidwell, 182 U.S. 1, 220 (1901).

1771. Downes v. Bidwell, 182 U.S. 244, 306 (1901) (White, J., concurring).

1772. *Id.*

1773. Justice Brown opened his autobiography with the statement, "I was born of a New England Puritan family in which there has been no admixture of blood for 250 years." Henry B. Brown, *Memoranda for Biographical Sketch*, *in* MEMOIR OF HENRY BILLINGS BROWN 1 (Charles A. Kent ed., 1915).

1774. 182 U.S. 244, 286–87 (1901) (emphasis added).

the *Insular Cases*, "Why, sir, if we had not decided as we did, this country would have been less than a Nation!"[1775]

Nativist authoritarianism helps explain both why the Court felt compelled to uphold the policies of the Gilded Age and why it felt that the exercise of federal power should be relatively unconstrained. The nation's expansionist and authoritarian concerns, in particular, help explain why the Court wished to ensure that national power would be so completely unconstrained in the international sphere. These concerns do not fully explain, however, why the Court resorted to the inherent powers doctrine as the means of achieving the desired results. It remains unclear, for example, why it was *more* palatable for the Court to embrace an extratextual approach than to locate the powers at issue in an enumerated clause. Why, given the availability of plausible textual origins for the powers being asserted, such as the Migration, Foreign and Indian Commerce, and Territory Clauses, didn't the Court simply locate the authority there? Deriving broad implied powers from an enumerated clause would seem to be more consistent with traditional modes of constitutional interpretation than stepping outside the Constitution altogether. Resort to an extraconstitutional *source* of authority thus seems to have been unnecessary.

Furthermore, although the Court's desire for an unlimited foreign affairs authority was certainly served by the inherent powers doctrine, which trumped most other constitutional constraints, resort to inherent powers was not clearly necessary to eliminate meaningful individual rights constraints on governmental power. The Court's domestic decisions repeatedly demonstrated the Court's ability to withhold constitutional protections from disfavored groups *within* the traditional enumerated powers-limited government framework. Decisions such as *Plessy v. Ferguson*, *Bradwell v. Illinois*, and others denying the constitutional claims of African-Americans and women established that a restrictive view of the Constitution's individual rights provisions was readily available that did not depend on inherent powers analysis.[1776] And as Reva Siegel has demonstrated, traditional principles of federalism were used in the latter nineteenth century to justify the denial of suffrage to women.[1777] Thus, traditional doctrines of enumerated powers and existing individual rights jurisprudence would seem largely, if perhaps not completely, adequate, for achieving the robust foreign affairs authority the majority desired to reach.

1775. WARREN, *supra* note 244, at 710–11.

1776. *See supra* notes 1748–52 and accompanying text.

1777. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 997–1006 (2002); *see also id.* at 948 (noting that opponents invoked "understandings of federalism that placed family relations beyond the reach of the national government").

C. *Dual Federalism and Foreign Affairs*

Ultimately, it appears that federalism provided the Court's greatest motivation for resorting to a theory of inherent powers. Resort to an inherent source of authority, derived from international principles of sovereignty, allowed the Court to adopt an expansive interpretation of national power while honoring federalism concerns by avoiding the possibility that expansive interpretations of enumerated powers would spill over into the domestic sphere.

By the end of the nineteenth century, the original vision of an imperfect and limited national government, with powers reserved to the states and the people, had been reorganized by the Court to emphasize a dual system of federally divided powers. As Owen Fiss has observed, domestic jurisprudence reflected "the limited character of the central government, as a government among governments."[1778] Two sovereigns operated in the domestic context—the national government and the states—which together were viewed as possessing all sovereign powers.[1779] The Court viewed its primary function as policing the line between these sovereigns. Thus, the domestic decisions restricting federal authority such as *E.C. Knight* and *Pollock* were motivated in large part by a concern for maintaining the proper boundaries of federalism and preventing national encroachments on state power.

Federalism's emphasis on *dual* sovereignty contributed to the inherent powers doctrine in two ways. First, the assumption that all sovereign powers were held by either the national or state governments facilitated the conclusion that a power was held by the national government whenever state authority was inappropriate. This approach ignored classical concepts of divided sovereignty by eliminating the possibility that power had been reserved to the people. Second, by focusing on protecting states from national encroachments, dual sovereignty eliminated concerns about limiting national power where state authority was not implicated. Here again, classical American political doctrine still would have obligated the Court to consider whether a power had been delegated to the federal government or was otherwise constrained by the Constitution. But the Court was much less interested in constraining national power where conflicts with state authority were not implicated. In cases involving territories outside the organized states or populations (Indians, immigrants, or nationals outside U.S. boundaries) whose governance the Court had placed exclusively in the hands

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1778. FISS, *supra* note 668, at 116.

1779. *See, e.g.*, Kidd v. Pearson, 128 U.S. 1, 16–17 (1888) ("[T]he supreme authority in this country is divided between the government of the United States, whose action extends over the whole Union, but which possesses only certain powers enumerated in its written Constitution, and the separate governments of the several States, which retain all powers not delegated to the Union.") (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

of the national authorities, *federalism* exerted no constraint on national power. The Court was not required to intervene to protect the states, nor was any other government available to exercise the power. The Court instead shifted its attention to the potential for conflict with foreign sovereigns and focused on the authority provided by international law.[1780]

The Court's retreat from the Commerce Clause in the Indian and immigration cases vividly illustrates the relationship between federalism and the inherent powers decisions. In the three years between 1886 and 1889, the Court distanced itself from Commerce Clause analysis in both areas in *Kagama* and *Chae Chan Ping*. The move was particularly striking in the immigration context, because the Court for fifteen years prior had unanimously *upheld* the immigration power as foreign commerce. Developments in domestic Commerce Clause jurisprudence, however, may have rendered the Commerce Clause inhospitable for these purposes. In the latter 1800s, Congress began to exercise its interstate commerce power through the adoption of the Interstate Commerce Act in 1887 and the Sherman Anti-Trust Act in 1890. The Court responded by attempting in earnest to rigidly demarcate the boundaries between federal and state powers. Decisions such as *Coe v. Town of Errol*,[1781] and *Kidd v. Pearson*,[1782] both upheld state laws over Commerce Clause objections by narrowly confining the range of commerce that was subject to federal power. In both cases, the Court affirmed that mere production for the purpose of sale in interstate commerce did not take a commodity out of the realm of state power. The contrary view, the *Kidd* Court warned, would yield the result "that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."[1783] The Court was approaching the height of its formalistic effort to demarcate the boundaries between the state police power and the federal commerce power. In this context, it is not surprising that the Court was unsympathetic to the government's argument in *Kagama* that the federal Indian commerce power allowed regulation of all aspects of Indian affairs, unconstrained by the Constitution. Justice Miller's conclusion that allowing Congress to enact an entire criminal code for the Indian tribes would "strain[]" the Indian Commerce Clause was an understatement at best.[1784]

1780. Interestingly, separation of powers questions are entirely absent from the cases. The era was one of weak Presidents, and the vast majority of the eases involved congressional power. Even when executive action was at issue, as in *Cross v. Harrison* and *Neely*, however, no question was raised regarding whether the executive was the appropriate branch of government to exercise the power.

1781. 116 U.S. 517 (1886) (upholding a local tax of logs intended for export).

1782. 128 U.S. 1 (1888) (upholding a state ban on production of alcoholic beverages).

1783. *Id.* at 21.

1784. United States v. Kagama, 118 U.S. 375, 378–79 (1886). This theory is supported by the fact that where the Court could comfortably rely on the Indian Commeree Clause, as in *Cherokee*

Even if one were willing to disregard Chief Justice Taney's conclusion that the Territory Clause applied only to the original U.S. territory, broad interpretations of the Territory Clause were also threatening to the domestic balanee of power if applied to the organized, white-settled territories which were destined for statehood. In *Dooley II*, Justice Brown dismissed the possibility that Congress's relatively unlimited power over the Insular territories could spill over into federal-state relations, noting that "[t]here is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the states."[1785] The Court became willing to rely on the Territory Clause only in the late *Insular Cases*, at which point the Court had developed a separate mechanism—the concept of incorporation—to restrict plenary congressional power to the Insular possessions.

The Court's dual sovereignty approach is clearly visible in the inherent powers cases. In *Kagama*, Justice Miller reasoned that "[t]here exist[s] within the broad domain of sovereignty but these two [the national government and the states],"[1786] and that the exclusion of Indians from state power subjected them by default to national authority.[1787] In *Chae Chan Ping*, Justice Field bootstrapped the idea that the national government enjoyed exclusive power over immigration *vis-a-vis* the *states*, which had been established in the Court's earlier decisions, into a conclusion that the national government's power was unlimited.[1788]

The influence exerted by federalism is also visible in the few Indian, alien, and territory cases that did implicate state authority. In *Worcester* and in immigration decisions such as *Henderson v. Mayor of New York*,[1789] *Chy Lung*, and *Yick Wo*, the Court applied traditional constitutional analysis, rooting federal authority in enumerated provisions (such as the Indian and Foreign Commerce Clauses) to exclude interference by the states. Where national power over territories *conflicted* with state authority, such as in *Kansas v. Colorado*,[1790] the Court likewise rejected inherent powers claims to emphasize the limited and delegated nature of the national government. The Court's 1905 decision in *In re Heff*, addressing the impact of Indian citizenship on federal authority, was clearly motivated in part by the fact that the Court was choosing between the operation of federal and state power.

Nation v. Southern Kansas Ry. Co., 135 U.S. 641 (1890), it did so. *See also supra* notes 913–19 and accompanying text (discussing the Court's retreat from the Commerce Clause in *Chae Chan Ping*).

1785. Dooley v. United States, 183 U.S. 151, 157 (1901).

1786. *Kagama*, 118 U.S. at 379.

1787. *Id.* at 383–84.

1788. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

1789. 92 U.S. 259 (1875) (invalidating under the Commerce Clause a requirement that ships entering New York either supply a bond or pay a fee for each passenger).

1790. 206 U.S. 46 (1907).

The Court invoked dual sovereignty to conclude that the grant of citizenship had dissolved the federal government's rights and placed Indian citizens under state jurisdiction.[1791] The Court was also more willing to enforce constitutional individual rights protections against state actors than against federal authority, as demonstrated by its rejection of arbitrary state power over aliens in *Chy Lung* and *Yick Wo* and its tolerance of arbitrary national power in *Nishimura Ekiu*.[1792] On the other hand, in the exclusion and deportation cases, where no state authority was implicated, the Court did not attempt to root the national power in any particular constitutional provision and rejected individual rights claims to uphold broad inherent national power. *Yick Wo* and *Kagama* were decided on the same day, and the striking difference in their approaches to constitutional interpretation may be attributable to the fact that *Yick Wo* involved the exercise of state power, while in *Kagama*, federal-state relations were not implicated.[1793]

Given the Court's evident concern about broadly construing enumerated federal provisions that might have implications for the balance of federal-state authority, the Court could have concluded either that the power did not exist in the national government—a proposition that it apparently found unpalatable by the end of the century, for the reasons discussed above—or that it could seek some other source for the authority. Rooting the authority in inherent sovereign powers under international law insulated the grant of broad authority from spillover into the states, since the states were not understood to exercise such powers. Indeed, where an enumerated clause such as the treaty power did not implicate state authority, the Court was equally willing to recognize unlimited federal powers.[1794] The Court's focus on dual federalism thus allowed the Court to detach even the constitutional text over foreign affairs from traditional enumerated powers and limited government analysis. Thus the Court's inherent powers analysis supplied sufficiently broad national authority to embrace the aspirations of the Gilded Age without concern that the power would alter the delicate domestic constitutional balance.

1791. *In re* Heff, 197 U.S. 488, 505 (1905) ("In this Republic there is a dual system of government, National and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other.").

1792. The Court's approach was not perfectly uniform, of course. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court enforced Fifth and Sixth Amendment protections against the national government's effort to imprison deportees at hard labor. No question of state power was presented. The Court's resort to traditional enumerated powers analysis may be attributable to theories of constitutional territoriality.

1793. *Kagama* was decided the same day that the Court upheld application of the Fourteenth Amendment to aliens in *Yick Wo* and to corporations in *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886).

1794. *See In re* Ross, 140 U.S. 453 (1891) (holding that the United States can act extraterritorially pursuant to the treaty power without constitutional constraint).

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In sum, by the late 1800s, federalism combined with nativist hostility toward non-Anglo-Saxon peoples and nationalist ambitions abroad to form a new constitutional doctrine in which the Constitution's limits on governmental power were confined, not merely to citizens, but to the "inheritors of [male] Anglo-Saxon civilization" in the domestic sphere. As George Canfield wrote:

> Those who established the Union were opposed rather to a strong government *as against themselves* than to a strong government in the abstract; indeed, . . . *they constructed a government with full sovereign power, that is, with absolute and unlimited authority, as against other nations, and with qualified and restricted powers as against themselves*, and the object of the restrictive clauses was the protection of those privileges and institutions which were dear to them as inheritors of Anglo-Saxon civilization, and *not the protection of other peoples and nations to whom these privileges and institutions were foreign and perhaps wholly unknown.*[1795]

Xenophobic, ascriptivist nationalism, of course, was not the only vision of American identity operative during the late nineteenth century. Throughout the period, a vocal minority of American politieians, judges, and lawyers attempted to assert a more egalitarian vision of American society, rooted in the universal principles of the Constitution and the Declaration of Independence, and in the anti-caste impulse behind the Reconstruction Amendments. This minority invoked due process, equal protection, and racial equality to oppose the Chinese Exclusion laws[1796] and argued that America's imperialist adventures were fundamentally contrary to republican governance. The egalitarian, limited-government impulse was asserted repeatedly throughout the inherent powers decisions in disscnts by Chief Justice Fuller and Justices Field, Harlan, and Brewer. In particular, a number of the notable immigration and territory decisions were not unanimous but provoked bitter dissents. *Fong Yue Ting* was decided by a five-to-three majority, for example; the early *Insular Cases* upheld the equal treatment of the new territories, and *Downes v. Bidwell* was decided by a sharply divided five-to-four Court.

The minority vision also scored a few notable victories during the inherent powers era. The decisions in *Yick Wo* and *Wong Wing* recognized—over the U.S. government's strenuous objection—that immigrants present in the United States were entitled to constitutional protections in their social and

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1795. Canfield, *supra* note 304, at 27 (emphasis added).

1796. *See* GYORY, *supra* note 770, at 223–28 (discussing the effects of this egalitarian minority); SMITH, *supra* note 95, at 359–60 (highlighting the opposition led by Massachusctts Republican Senator George Hoar and Tennessee Republican William Moore, who invoked natural rights principles of the Declaration of Independence).

economic activities. The decision in *Wong Kim Ark* concluded (over the dissent of Chief Justice Fuller and Justice Harlan) that Chinese immigrants were entitled to birthright citizenship under the Fourteenth Amendment. In the territorial decisions, the minority view ultimately prevented the Court from embracing an *entirely* extraconstitutional status for Puerto Rico and the Philippines, and instead led it to hold that the most fundamental constitutional rights did apply. However, the minority vision made little headway in the Indian cases or decisions relating to the admission and expulsion of aliens. And with respect to the territories, the Court never found a constitutional provision during this period that it considered sufficiently fundamental to limit federal action. The lack of federalism constraints, as well as broad nationalistic and xenophobic impulses, radically modified the Constitution's operation in these contexts.

The inherent powers era thus reflected a struggle for the soul of the Constitution. And while the inherent powers doctrine prevailed in many areas, it did so despite the presence of both historically available and cogent, contemporary arguments that the inherent powers doctrine was incompatible with American constitutional governance.

VII. Curtiss-Wright Revisited

The decisions in the Indian, alien, and territory cases do much to explain, though not to justify, the inherent powers analysis of *Curtiss-Wright.* At first blush, Justice Sutherland's theory of expansive federal power over foreign affairs appears oddly modern in light of Sutherland's role as one of the "four horsemen" of the pre-1937 Court and his formalistic approach to domestic issues. Two terms before, the Court had decided *Panama Refining Co. v. Ryan*[1797] and *Schechter Poultry Corp. v. United States*,[1798] the only two cases in which the Court had ever invalidated legislation as an unconstitutional delegation of congressional authority. *Curtiss-Wright*'s deferential approach to national power accordingly has been viewed as foreshadowing the Court's 1937 revolution. The decisions of the nineteenth century, however, indicate that much of *Curtiss-Wright*'s inherent powers analysis was strikingly nostalgic. Sutherland's introduction of executive hegemony over foreign relations unquestionably was a radical innovation. But his reliance on a theory of inherent sovereign powers, his view of strict constitutional territoriality, and his overarching emphasis on federalism all derived directly from late-nineteenth-century doctrines developed in the Indian, alien, and territory cases.

1797. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (invalidating the section of the National Industrial Recovery Act which authorized the President to prohibit transportation of petroleum produced in excess of amount permitted by state).

1798. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down provisions of the National Recovery Act which authorized the President to create "codes of fair competition").

Sutherland's conception of the national government holding powers "equal to the right and power of the other members of the international family" was a recurrent theme throughout the late-nineteenth-century cases.[1799] Sutherland himself cited the powers to acquire territory by discovery and to expel aliens as examples of inherent sovereign powers, "none of which is expressly affirmed by the Constitution," but which "nevertheless exist as inherently inseparable from the conception of nationality."[1800] Sutherland's assertion that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory" was also a familiar articulation of strict territoriality principles.[1801]

In particular, Sutherland's distinction between internal and external powers and his conclusion that the enumerated powers doctrine does not apply to foreign relations both derive from late-nineteenth-century concepts of federalism. Sutherland emphasized constitutional constraints on national authority in striking down federal labor legislation in *Carter v. Carter Coal*, but he simultaneously asserted that constitutional limitations were irrelevant in the foreign relations context. That approach, which appears facially inconsistent, can be understood once it is recognized that Sutherland's formalism derives from his overriding view of the Constitution as protecting states from federal encroachment. Sutherland noted in *Carter v. Carter Coal* that

> since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom.[1802]

This is the classic late-nineteenth-century vision of dual sovereignty. Sutherland contended that "the primary purpose of the Constitution" was to carve out certain powers from the states to be vested in the federal government.[1803] In the foreign affairs realm, where states were not operative, the need for vigilant policing of the boundaries of governmental power was not present.[1804] Sutherland's analysis simply ignored the prominence of foreign affairs among the enumerated powers of the national government. And like the Court's late-nineteenth-century cases, it utterly eliminated the

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1799. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

1800. *Id.* (citing Jones v. United States, 137 U.S. 202, 212 (1890); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893)). In each of these areas, he maintained, the Supreme Court had "found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations." *Id.*

1801. *Id.*

1802. Carter v. Carter Coal Co., 298 U.S. 238, 294–95 (1936).

1803. *Curtiss-Wright*, 299 U.S. at 316.

1804. *See also* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

concepts of enumerated national authority, separation of powers, individual rights, and sovereignty reserved to the people.

Indeed, Sutherland's commitment to the demarcation between foreign and domestic relations was sufficiently rigid that he was not concerned that national foreign relations decisions might adversely affect reserved state powers. Sutherland joined Justice Holmes' decision in *Missouri v. Holland* which rejected the possibility that the treaty power could infringe on the states' unenumerated powers,[1805] and he authored the decision in *United States v. Belmont*, which reaffirmed the distinction between internal and external powers to uphold the ability of a sole executive agreement to violate state public policies.[1806] "Plainly," Sutherland wrote in *Belmont*, "the external powers of the United States are to be exercised without regard to state laws or policies. . . . In respect of our foreign relations . . . the State of New York does not exist."[1807]

The Court's reliance on federalism as the bellwether of national power was underscored by *United States v. Butler*, decided the same year as *Curtiss-Wright*. In that case, the Court emphasized that

> [t]he federal union is a government of delegated powers. It has only such as are expressly conferred upon it and as such are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.[1808]

The debt that Justice Sutherland owed the nineteenth century inherent powers decisions and ideology becomes even more explicit if the origins of his theory are examined. As noted in the introduction, Sutherland first articulated his theory of extraconstitutional foreign affairs powers in 1909, at the height of the inherent powers era.[1809] Sutherland's resulting artiele entitled *The Internal and External Powers of the National Government* offered a near-complete explication of the theory that would become *Curtiss-Wright*. The article opened by distinguishing the United States' internal and external powers, only the former of which, according to Sutherland, were delegated and limited by the Constitution. This distinction was expressly inspired by federalism. Sutherland viewed "the primary purpose" of enumerating the national government's powers as "to preclude any encroachment" upon the

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1805. Missouri v. Holland, 252 U.S. 416 (1920).

1806. United States v. Belmont, 301 U.S. 324 (1937).

1807. *Id.* at 331. As Sutherland noted in his 1910 articlc, "the boundaries of the State governments are confined to their own boundaries, hence . . . [the Tenth Amendment] can have no reference to any power to be exercised externally." Sutherland, *Internal and External Powers*, *supra* note 47, at 374.

1808. United States v. Butler, 297 U.S. 1, 63 (1936).

1809. *See supra* note 47.

states.[1810] Because states were "not competent to deal" with foreign affairs, the national government must possess these powers *in toto*, or no governmental authority would be capable of acting upon them.[1811] Sutherland then cited James Wilson for the proposition that inherent external powers had been contemplated at the Constitution's founding.[1812] In language that could have been drawn directly from *Chae Chan Ping* or the *Insular Cases*, Sutherland urged that the Framers

> knew that in the eye of international law every sovereign nation was *ipso facto* equal to every other sovereign nation, and that the highest law of every nation was that of self-preservation [citing Vattel] . . . . The government they instituted and contemplated was that of a fully sovereign nation, possessing and capable of exercising in the *family* of nations every sovereign power which any sovereign government possessed or was capable of exercising under the *law* of nations; unless prohibited or contrary to the fundamental principles upon which the Constitution was established. . . . It is time we realized . . . that the Government of the United States is perfect in all its limbs, and not a cripple among the full-grown governments of the world.[1813]

Sutherland had been a member of Congress when the *Insular Cases* were decided, and as a freshman congressmember from 1901 to 1903, he had actively advocated renewing the Chinese Exclusion Act and the destruction of the Indian tribal system, which he viewed as "contrary to the genius of our civilization."[1814] Other than citing the *Legal Tender Cases*, Sutherland's 1910 article relied exclusively on the Indian, alien, and territory cases as doctrinal support for his theory of inherent power. The Louisiana Purchase, he contended, had been justified in part on an "inherent right" to aequire territory,[1815] and the guano island decision of *Jones v. United States*,[1816] had been based solely on "*extra*-constitutional" powers "recognized by the principles of *international* law as belonging inherently to every sovereign nation."[1817] Although the constitutionality of the Alien Act had not been re-

1810. Sutherland, *Internal and External Powers*, *supra* note 47, at 375.

1811. *Id.* at 375. *See also id.* at 386 ("While maintaining the power of the general government to adequately meet and deal with every *external* situation which affects the general welfare of the United States, it is no less essential to maintain the supreme power of the State governments to deal with every question which affects only the *domestic* welfare of the *several* States."). Sutherland's belief in the distinction between federal and state authority in foreign affairs was so complete that he viewed the scope of the foreign commerce power as significantly broader than the interstate commerce power, which was limited by the interests of the states. *Id.* at 374.

1812. *Id.* at 377. *See also supra* note 27 (discussing the pre-ratification views of James Wilson).

1813. Sutherland, *Internal and External Powers*, *supra* note 47, at 381–82.

1814. *See* PASCHAL, *supra* note 47, at 44.

1815. Sutherland, *Internal and External Powers*, *supra* note 47, at 383.

1816. 137 U.S. 202 (1890).

1817. Sutherland, *Internal and External Powers*, *supra* note 47, at 384.

solved, *Nishimura Ekiu* and *Fong Yue Ting* had upheld the right to exclude and expel aliens as powers "inherent in sovereignty, and essential to self-preservation."[1818] Sutherland next cited *United States v. Kagama* for the proposition that federal power arose from "the right of exclusive sovereignty which must exist in the National government."[1819] Sutherland concluded by quoting his Michigan law professor, Judge Campbell, for the late-nineteenth-century inversion of the enumerated powers doctrine. Under the system of dual sovereigns, Campbell had written, "*if that which is essential to government is prohibited to one [government] it must of necessity be found in the other, and the prohibition in such case on the one side is equivalent to a grant on the other.*"[1820]

Sutherland's 1919 variation on this essay largely tracked the same argument, though it asserted that the Territory Clause provided no power to govern territories (e.g., the power must be inherent) and updated the argument to include the *Insular Cases*.[1821] He concluded that the various decisions established "that the powers to be exercised externally are not exclusively derived from, and are, consequently, not limited to, the grants and implications of the Constitution, but may find their warrant outside the terms of that instrument in the accepted rules of international law."[1822]

Thus, Sutherland's theory was distinctly *not* the product of the pre-World War II pressures that surrounded the decision in *Curtiss-Wright*, and was neither modernist nor originalist. Instead, it was retrospective, and was rooted directly in the principles of dual federalism and the peculiarly unattractive and illiberal view of national power that characterized the late-nineteenth-century inherent powers cases. This high positivist vision of American sovereignty had little to do with the constitutional structure as originally conceived, was unsupported by the Constitution's text, and was inconsistent with fundamental tenets of American political thought. Indeed, by the time Justice Sutherland articulated his theory of executive hegemony in *Curtiss-Wright*, the Court was edging toward new concepts of individual rights, due process, and the role of courts in adjudicating such rights, all of which were fundamentally incompatible with the inherent plenary power decisions of the 1890s.

VIII. Conclusion

Since the decisions in the inherent powers cases, both the assumptions of American constitutional doctrine and international law have changed in

1818. *Id.* at 385 (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)).

1819. *Id.* (quoting United States v. Kagama, 118 U.S. 375, 380 (1886)).

1820. *Id.* at 386 (quoting Van Husen v. Kanouse, 13 Mich. 303, 313–14 (1864)).

1821. SUTHERLAND, *supra* note 47, at 64–69.

1822. *Id.* at 58.

many fundamental ways. Concepts of citizenship and membership—and the constitutional protections that accompany them—have been expanded in the postwar years to be much more egalitarian and inclusive.[1823] Jurisprudence regarding individual rights has become much more robust. Many of the era's decisions regarding other disfavored groups have been abandoned, and principles of due process and equal protection now prohibit the exclusion of women and minorities from political life. Strict territoriality conceptions of the Constitution also have been transformed as both domestic and international law have recognized the authority of states to regulate extraterritorial conduct by noncitizens which has effects within their borders.[1824] Nor does international law continue to recognize the authority of states to rule aboriginal peoples and conquered territories as subjects. To the contrary, the doctrines which justified the colonial subjugation of aboriginal and conquered peoples have been replaced with international human rights principles mandating protection for national minorities and respect for cultural rights and self-determination. And the authority of states over aliens is now limited by international law protections regarding the rights of refugees, including the fundamental prohibition against forcible return. The concept of inherent powers itself has been repudiated as American constitutional doctrine has been reunited with its liberal political traditions.

Nevertheless, despite the dismantling of the premises that gave birth to the inherent powers doctrine, the era's decisions regarding national power over Indians, aliens, and territories remain largely intact. The Supreme Court has spent much of the past century repackaging the inherent powers doctrines into traditional enumerated categories without significant change to the underlying holdings. Rationales that allowed the exercise of governmental power based on doctrines of inherent powers and international law now parade as enumerated text without any recognition either of the international law origins of the principles or the racist, illiberal ideology on which they are based. Precepts of sovereign powers continue to exert a powerful influence over judicial decisions, with the result that courts continue to deny other constitutional protections and defer expansively to federal action in all three areas.

The first question that might be asked about the modern implications of the doctrines is whether it makes any significant difference that the doctrines originally derived from inherent powers concepts. If the modern Foreign Commerce Clause is sufficiently broad to embrace the immigration power,

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1823. *See* ALEINIKOFF, *supra* note 50.

1824. United States v. Verdugo-Urquidez, 494 U.S. 259, 280–81 (1990) (Brennan, J., dissenting) (discussing "[t]he enormous expansion of federal criminal jurisdiction outside our Nation's boundaries" through the extraterritorial application of antitrust and seeurities laws and other criminal statutes).

for example, does it matter that the Commerce Clause was not the power's original basis? The answer is that it does matter for at least two reasons. First, deriving the power exclusively from the Commerce Clause would at least indicate what branch of the national government possesses the power. It would answer the separation of powers question, which has taken on increasing significance with the expansion of the modern executive. Rooting the authority in inherent powers leaves this question open, however, with the result that modern courts have interpreted the nineteenth century immigration decisions plus *Curtiss-Wright* to conclude that the President also enjoys inherent authority over immigration.[1825] Under this approach, the failure of Congress to authorize an action does not bar the President from ordering it.

Second, rooting the power in sovereignty also continues to leave open the question of what constitutional limits, if any, constrain the power. Deriving a power from an enumerated source at least brings the authority within traditional enumerated powers analysis and makes it more likely that constitutional constraints, such as individual rights protections and judicial review, would also apply. Since *Gibbons v. Ogden*, the federal commerce power has been recognized as "plenary," at least with respect to federal-state relations. Yet Congress may not constitutionally exercise its authority under the commerce power to discriminate overtly on the basis of race, to deny basic First Amendment rights, or to violate other fundamental constitutional protections which are routinely waived in immigration cases. As the Court noted in *Buckley v. Valeo*, "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, . . . *so long as the exercise of that authority does not offend some other constitutional restriction.*"[1826] The concept of "plenary power" in the inherent powers context, however, remains detached from this basic assumption.

The Rehnquist Court in many ways has resurrected the approach of the inherent powers era. The decision in *Verdugo* employed a social contract analysis reminiscent of that adopted by the late-nineteenth-century Court and purported to reaffirm the decisions in the *Insular Cases* and *In re Ross*.[1827] The Court has also resurrected the dual sovereignty approach of that era, engaging in searching scrutiny of federal-state relations in Commerce Clause

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1825. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); Fong Yue Ting v. United States, 149 U.S. 698 (1893)); *see supra* notes 1101–02 and accompanying text. *See also* Narenji v. Civiletti, 617 F.2d 745, 747–48 (D.C. Cir. 1979) (upholding reporting requirements for Iranian students); United States Supreme Court Official Transcript, Sale v. Haitian Ctrs. Council, Inc., Mar. 2, 1993, at 10–11, No. 92–344, *available at* 1993 WL 754941 (argument for United States) (citing *Knauff* in support of executive immigration authority).

1826. Buckley v. Valeo, 424 U.S. 1, 132 (1975) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (emphasis added)).

1827. *Verdugo*, 494 U.S. at 268; *id.* at 277 (Kennedy, J., concurring) ("We have not overruled either *In re Ross* or the so-called *Insular Cases*.").

and Eleventh Amendment cases while broadly deferring to the national government in the foreign affairs area.[1828] The Court's deferential approach to domestic and foreign relations is entirely consistent with a jurisprudence that elevates federalism over other principles of enumerated powers and individual rights. Indeed, the Rehnquist Court's increasingly restrictive approach to national authority in the domestic sphere raises interesting questions regarding the extent to which the Court will continue to authorize expansive national authority over foreign relations. Both the late-nineteenth-century Court and Justice Sutherland relied on the complete absence of any state interest in the foreign affairs area to justify broad federal power. The years since those decisions have demonstrated, however, that foreign relations and state interests cannot always be so hermetically separated. A state's interest in local taxation may conflict with international rules.[1829] A state's valid interests in free speech and acting as a market participant may conflict with national economic policies.[1830] And a state's interest in enforcing its criminal laws by imposing capital punishment on a foreign national may provoke retaliation from abroad.[1831] It remains unclear how the current Supreme Court's enthusiasm for protecting both state autonomy and the foreign affairs powers will be reconciled in these areas.

The international law origins of the inherent powers decisions also raise complex challenges for modern constitutional approaches. First, if the government's constitutional *authority* derives from customary international law, should not the authority likewise be limited by customary international law *constraints*? One could argue that the nineteenth century Court looked to international law only for guidance regarding the normative principles it might embrace. But the inherent powers cases appeared to invoke international law in place of enumerated constitutional authority and viewed the powers as sufficiently powerful to exempt or override other constitutional limitations. The Court repeatedly utilized international law as a source of authority for U.S. governmental action but did not recognize it as a source of constraint. Thus, in the immigration context, the Supreme Court upheld the government's authority under international law to exclude and deport aliens but rejected the contention that international rules regarding denizens limited

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1828. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981).

1829. *See* Barclay's Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994) (upholding California's worldwide combined reporting requirement over strenuous international objection).

1830. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (invalidating state sanctions against Burma as preempted by federal statute).

1831. Breard v. Greene, 523 U.S. 371 (1998) (rejecting Paraguay's request for a stay of execution based on the state's violation of defendant's right to consular notification and the International Court of Justice's request for provisional measures). For further diseussion of the tension between state authority and U.S. foreign relations jurisprudence, see Sarah H. Cleveland, Crosby *and the "One Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); Ernest Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001).

the government's ability to deport or banish long-term lawful residents. But if the government's *constitutional* authority over aliens is based on international law definitions, then the government's constitutional authority logically also should be limited by the constraints that international law imposes.

Equally importantly, the constitutionalization of international law norms raises the question whether those norms should be frozen in time. If U.S. authority derived from international law, should those powers evolve as international norms develop? Where clauses of the Constitution have been read as incorporating common-law principles, originalists have argued that the provisions must be read according to common-law rules that prevailed when the Constitution was adopted. Originalism makes little sense in the inherent powers context, however, since neither the inherent powers approach nor many of the international norms on which it relied were principles that had prevailed in 1787. An interpretation that did not allow the authority to evolve over time would freeze U.S. constitutional analysis in a peculiarly racist and imperialist moment of the late nineteenth century. If the authority is not fixed, however, then the government's constitutional authority should evolve with international law and recognize the developments in international law over the succeeding century. For example, although international law generally continues to recognize the authority of states to exclude or expel aliens, today the U.N. Convention and Protocol on the Status of Refugees, the Torture Convention, and other international law instruments and rules of customary international law prohibit states from expelling aliens to countries where they will suffer persecution.[1832] If, indeed, the national government's constitutional authority to exclude aliens derives from international law, then this power simultaneously should be limited, as a constitutional matter, by customary international law constraints such as the duty of *nonrefoulement*.[1833] International law norms regarding the rights of indigenous peoples and colonial inhabitants raise similar questions regarding doctrinal evolution.[1834] As Professor Frickey has argued, should what is constitutional sauce for the goose be sauce for the gander in this context?[1835] There does not appear to be any principled basis on which the Court can pick and choose among international law doctrines in this manner.

Finally, any continued reliance on the Court's nineteenth century decisions may call for a reexamination of modern nnderstandings of the

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1832. United Nations Convention and Protocol Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force on Apr. 22, 1954), art. 33; 19 U.S.T. 6223, T.I.A.S. No. 6577 (Jan. 31, 1967); Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

1833. *Cf.* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (holding that the U.S. statutory and treaty obligation not to return refugees does not apply to extraterritorial U.S. actions).

1834. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996).

1835. Phillip H. Frickey, *Domesticating*, *supra* note 52, at 74.

relationship between constitutional and international law. Contemporary scholars have attacked the authority of the federal courts to interpret and apply international law, contending that the current approach to customary international law is constitutionally illegitimate.[1836] Yet, as the cases of the last century demonstrate, the Court historically has relied on international law as an important source of federal constitutional authority. It would be logical for the Framers to look to international law in defining the country's enumerated foreign affairs powers, and the constitutionalization of international law was common in the early years of the republic,[1837] when the law of nations was considered coterminous with natural law.[1838] Resort to international law in many respects continued throughout the nineteenth century. The decisions of that century thus portray the Court as significantly more receptive to international law norms than is widely understood at present. The Spanish-American War, which produced the *Insular Cases*, also produced *The Paquete Habana*[1839]—in which the Court famously pronounced that "international law is part of our law"—as well as a number of other important international law cases.[1840] And while scholars hostile to international law approaches have attempted to marginalize *The Paquete Habana*, the Court's monistic approach to international law in that case is entirely consistent with the nineteenth century decisions.

One may argue that reliance on international law brings with it the unsavory practice of withholding other constitutional constraints. But nothing in the Court's reliance on international law compelled the Court's separate conclusion that ordinary constitutional constraints and judicial

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1836. *See generally* sources cited *supra* note 21.

1837. Chief Justice Marshall noted in *Gibbons v. Ogden* that the foreign commerce power derived "from those laws whose authority is acknowledged by civilized man throughout the world . . . . The Constitution found it an existing right, and gave to Congress the power to regulate it." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824); *see also* Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.) ("The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commereial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice . . . .").

1838. As Vattel famously observed, "the *law of Nations* is originally no other than the *law of Nature applied* to Nations." VATTEL, *supra* note 56, Preliminaries, at lvi. Vattel nevertheless also recognized the cxistence of positive international law.

1839. 175 U.S. 677 (1900).

1840. *See* The Adula, 176 U.S. 361 (1900) (noting the difference between the legality of a simple or actual blockade and a public or presidential blockade in international law and relying on foreign admiralty case law); The Panama, 176 U.S. 535 (1900) (holding that international law does not exempt mail ships from capture as war booty); The Benito Estenger, 176 U.S. 568 (1900) (relying on international law for the proposition that the general rule in war is that the citizens or subjects of the belligerents are enemies to each other, that political status determines enemy ownership, and explaining the principle of *flagrante bello*); The Pedro, 175 U.S. 354 (1899) (relying on forcign case law to support the holding that the ship in question must be deemed Spanish); The Buena Ventura, 175 U.S. 384 (1899) (interpreting an executive proclamation laying down rules for the treatment of merchant vessels during a time of hostility).

review would not apply, and I would argue that the Court's approach to these latter questions was fundamentally illegitimate. However, the Court's willingness to consider international law in defining the enumerated foreign affairs powers is both longstanding and legitimate. This dialogue between international and constitutional law principles has been largely lost to modern constitutional jurisprudence. The modern Supreme Court has applied the doctrine of plenary power over foreign relations with enthusiasm while simultaneously rejecting the very international law principles from which that power derived.[1841] An accurate historical understanding of U.S. constitutional doctrines in this area suggests that U.S. authority over foreign relations should be applied with greater sensitivity for international law.

The foregoing discussion is intended to raise questions more than to provide answers, and a full exploration of the contemporary implications of the inherent powers decisions is beyond the scope of this Article. The historical review of the decisions and the context in which they arose, however, demonstrates unequivocally that not only do they lack support in the Constitution's text, structure, and original understanding, but they rely on both doctrinal approaches and assumptions about the social good that have been fundamentally rejected. The decisions raise very hard questions regarding the territorial and popular scope of the Constitution and our understanding of who we are as a nation. They pose fundamental questions about whether the Constitution establishes a government whose powers are limited with respect to all persons over whom it acts, or whether it is simply an affirmative grant of positive rights to a specific, identifiable population—"We the People"—with unconstrained, inherent powers outside of that zone. Chief Justice Taney in *Dred Scott* and *Rogers* held that "we the people" obviously did not include African Americans or Indians. A decade ago, Chief Justice Rehnquist in *Verdugo* resurrected a similar analysis and applied the *Insular Cases* to hold that "we the people" did not include nonresident aliens outside the United States.

Since the Second World War, the United States has adopted significantly more inclusive and pluralistic views of national membership and a robust jurisprudence of individual rights. Our concepts of territoriality have been revolutionized to the point that extraterritorial actions by the

1841. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (declining to consider customary international law in holding that the respondent's forcible abduction from Mexico did not violate the U.S.-Mexico extradition treaty). The question of the relevance of international law to constitutional analysis has been particularly hotly contested in the Eighth Amendment context. *Compare* Atkins v. Virginia, 122 S.Ct. 2242, 2249 n.21 (2002) (Stevens, J.) (holding that execution of the mentally retarded is cruel and unusual punishment and considering international practice), *with* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (Scalia, J.) (rejecting a claim that the execution of persons who were over 15 at the time of the crime constitutes cruel and unusual punishment, and "emphasiz[ing] that it is American conceptions of decency that are dispositive" over the dissent's contention that international practice is relevant).

United States are routine, and colonialism no longer is respected as a hallmark of nationhood, but is condemned as a violation of national self-determination. The United States, and the international community, are now in very different places than they were when these cases were decided. The Court's continued application of these anomalous doctrines does ongoing damage to the fabric of the Constitution and to the United States' relationship to international law. The centennial of these decisions is an appropriate time to reexamine the doctrines developed at the end of the last century, and to question whether they accurately reflect our understanding of who we are as a nation. If we can agree that the worldview on which the decisions were based is unattractive today, we should cease relying on doctrines that are avowedly and fundamentally inconsistent with America's liberal political traditions.